

American Bar Association Journal

April 1950

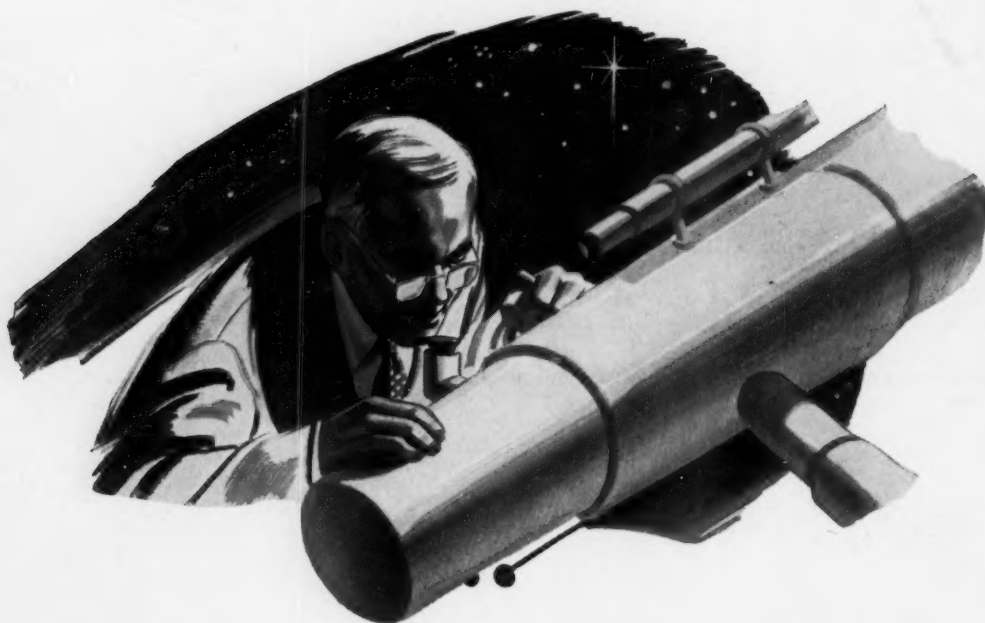
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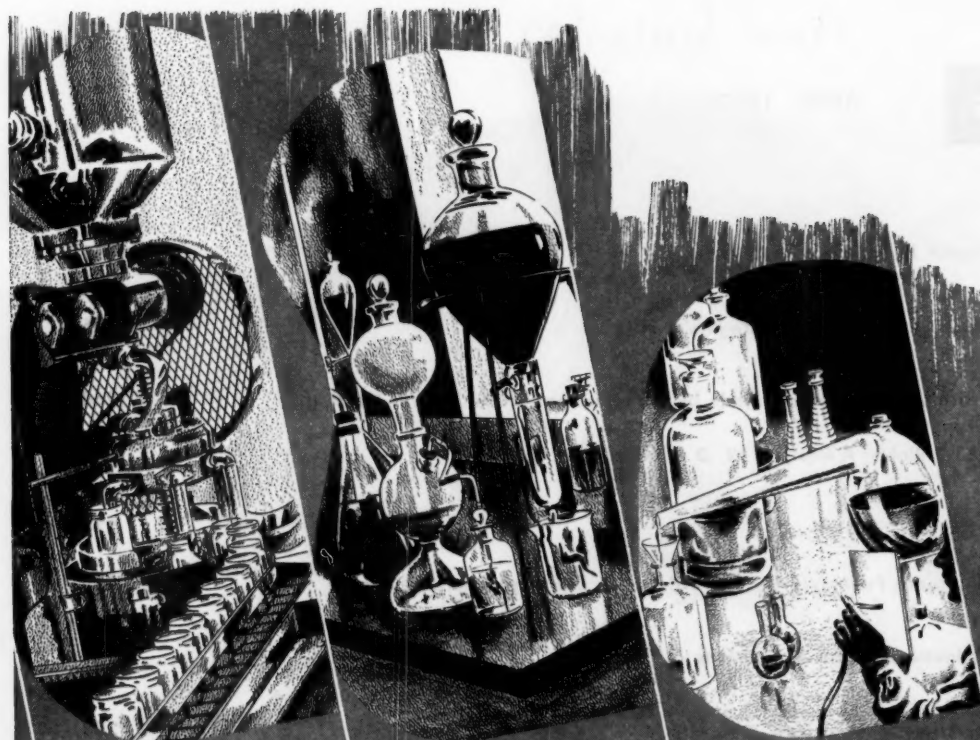
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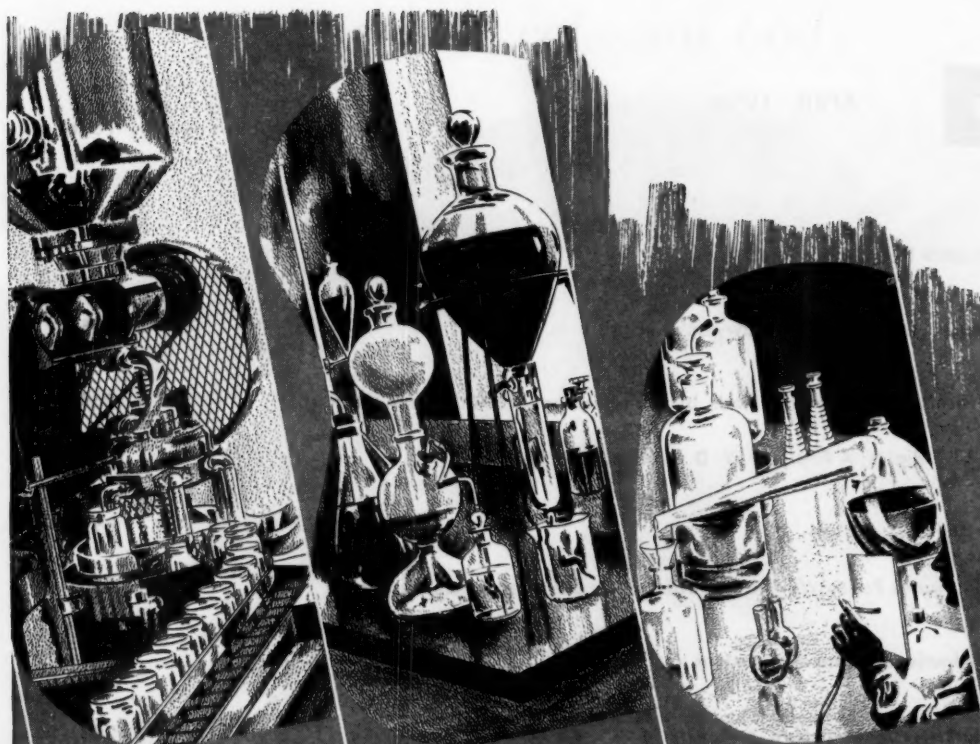
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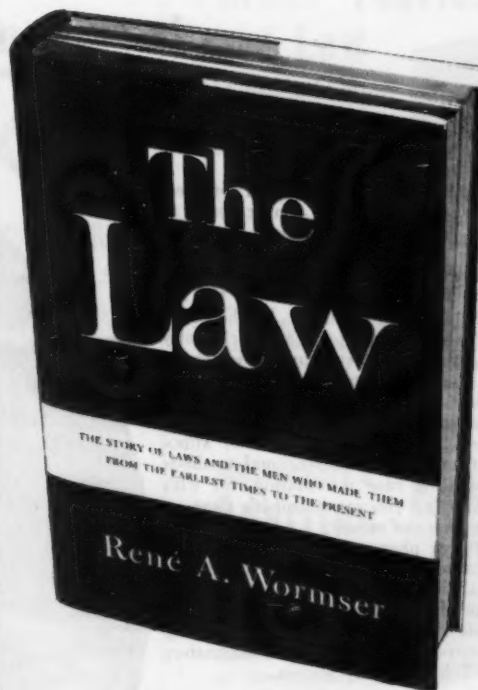
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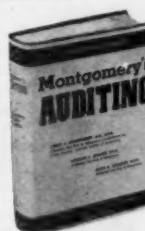
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Detailed announcement with respect to the making of hotel reservations for members of the Association may be found in the January issue of the JOURNAL, at page 74.

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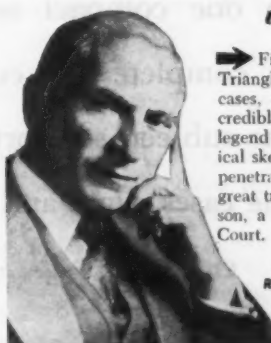
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The Secret of Mr. Justice Holmes:

An Analysis

by Harold R. McKinnon • of the California Bar (San Francisco)

■ With the possible exception of John Marshall, Oliver Wendell Holmes, Jr., probably has had greater influence upon American legal thought than any other member of the United States Supreme Court in the 161 years of its existence. Certainly Holmes is the best-known judge in the Court's history. Yet despite the aura of veneration that surrounds his name, the "Great Dissenter's" philosophy rests upon a standard of values cynical enough to lead him to define truth as "the power of the thought to get itself accepted in the competition of the market place." In this article, Mr. McKinnon puts his finger on the weakness of Justice Holmes' basic premises. He regards acceptance of Holmes' philosophy as a symptom of the spiritual crisis that the world faces today.

■ Two things about Justice Oliver Wendell Holmes need reconciliation. He had a very bad philosophy. Yet he ranks among the greatest men of our time.

His philosophy was agnostic, materialistic, hopeless of the attainment of any ultimate truth, meaning or standard of value. As a result, it is fundamentally indistinguishable from the amoral realism of those regimes of force and power that are the scandal of the century.

Nevertheless his rank is preëminent. Devotion to him has become a cult. Max Lerner, for example, says of him that "during the last quarter-century of his life he emerged as easily the most important legal philosopher of America", and that he is "perhaps the most complete personality in the history of American thought". Judge Jerome Frank commends him for having put away "childish longings for a father-controlled world", and says that in

consequence "whatever clear vision of legal realities we have attained in this country in the past twenty-five years is in large measure due to him". Mr. Justice Frankfurter says that he is Plato's "philosopher become king", and that, "He, above all others, has given the directions of contemporary jurisprudence." Mr. Justice Frankfurter further says, "He has built himself into the structure of our national life. He has written himself into the slender volume of the literature of all times." The late Justice Benjamin N. Cardozo regarded Holmes in similar fashion, for he called him "the great overlord of the law and its philosophy", and said that, "He is today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."

Admiration of him is not limited to legal circles. His Olympian qual-

ity has made him the hero of a successful play and biography; his letters are read and quoted throughout the country; and his very name has become a symbol of what is implicitly felt to be something characteristic of American life.

To the critic, therefore, Mr. Justice Holmes is a riddle for solution: a thinker who in his cosmic appraisals rejected what are the very foundations of our society but who is nevertheless honored as few other men of his time.

What is the secret of the riddle?

Holmes' Philosophy Was Not Consistent

Holmes was not a systematic philosopher. He scanned the universe and he looked for what is ultimate, and in that sense he philosophized. But he made no effort to place conclusions in rational and systematic order. He made intellectual thrusts here and there, like the essayist or poet; but there was no over-all pattern in his thinking. The results are an incompleteness and inconsistency that make it difficult to describe his convictions with accuracy. A mental attitude is clearly discernible, however. It is the attitude of positive science utilized as the only valid method of knowledge. In other words, it is antimetaphysical, skeptical and disdainful of any constants

or universals beneath the flux of change.

His concept of man is an instance in point. When thinking coldly, he said, he saw "no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand." Such a creature, of course, could not be the subject of moral rights or obligations. Thus Holmes said, "Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough." At another time he called ethics "a body of imperfect social generalizations expressed in terms of emotion." Therefore Holmes says, "I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it."

Human Rights Are Products of Law

From this it follows that man has no rights that are antecedent to the authority of the state. Human rights are inventions to account for the legal rules imposed upon us by society. That is, society decrees that we do certain things and abstain from certain things if we would remain free. Believing this, Holmes said, "I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights." But a "right" itself is an "empty substratum" by which we pretend to account for the fact of legal coercion. It is "only the hypothesis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." Holmes conceded that a man will fight for his rights, but, he said, "that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a pre-existing right. A dog will fight for his bone."

Commenting upon this, Mr. Lerner says, "We have here the behavioristic definition of law, squeezing it dry of all morality and sentiment. . . ." And in describing Holmes' doctrine on rights, Professor Harold Laski says, "Man may be an end to himself; to society, he is but a means likely enough to be used for purposes he may passionately deny."

Ultimate Reality Is Force

In such a regime, the ultimate reality is force. Thus Holmes said, "I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force."

This leaves no room for moral judgment or indignation, and human contests are like dog fights. Consistently, therefore, Holmes said (of World War I), "When the Germans in the late war disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can."

In Holmes' philosophy, truth fares no better than morals. First, it is the child of force. Thus he said, "Truth is the majority vote of that nation that can lick all the others." Next, it is essentially subjective and identifiable with the transient opinion of the crowd. Therefore he said that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Finally, since our convictions have no objective basis, we must accord the convictions of our opponents the same credit as our own. Accordingly, to Holmes both sides were right in the Civil War; and speaking about the fight for the kind of world we believe in, he said, "Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just

as good as ours." So with the secrets of philosophy; for he said that if a man should ask him whether there was any use trying to unravel the history of civilization that is woven in the tissue of our jurisprudence, or trying to do any great work, either of speculation or of practical affairs, he would have to say, "I cannot answer him; or at least my answer is as little worth making for any effect it will have upon his wishes as if he asked why should I eat this, or drink that. You must begin by wanting to."

Negations such as these are suggestive of a thorough-going skepticism. And it was true of Holmes. ". . . we begin," he said, "with an act of faith, with deciding that we are not God, for if we were dreaming the universe we should be God so far as we knew." Moreover, "You never can prove that you are awake. By an act of faith I assume that you exist in the same sense that I do and by the same act assume that I am in the universe and not it in me." There were some things which he held, and which he called "can't helps", but these were but his own preferences, because he said, "I regard myself as a cosmic ganglion—a part of an unimaginable and don't venture to assume that my *can't helps* which I call reason and truth are cosmic *can't helps*." "To have doubted one's own first principles," he said, "is the mark of a civilized man."

Holmes' Philosophy Made Him Agnostic

With such tenets, it scarcely needs saying that Holmes lacked religious faith. His approach to religion was rationalist, with a deep bias against affirmation. As the dramatist Emmet Lavery puts it in the play, *The Magnificent Yankee*, Holmes shouted "Not proved," at the universe, and the universe echoed "not proved". A clue to his antireligious attitude is to be found in his criticism of William James. Holmes said he suspected James' philosophy was a wishful construction and "that the aim and end of the whole business is religious." And on James' death, Holmes wrote of him, "His reason made him

skeptical and his wishes led him to turn down the lights so as to give miracle a chance."

A touching instance of his lack of faith is reenacted in the play *The Magnificent Yankee*. After half a century of marriage, Holmes' wife is approaching death. She shrinks from the idea of eternal separation from her husband, but his frequently expressed agnosticism has disqualified him from comforting her now. Justice Brandeis calls and Holmes leaves the two alone. But the substitute comforter is no better than his colleague. Mrs. Holmes asks him for some assurance of survival, to which Brandeis replies that, "the memory of virtue is immortal." "But," replies the invalid, "the memory of virtue isn't enough." Brandeis acknowledges defeat in a dumb silence, and Holmes reappears, substituting an artificial gaiety for the missing faith.

In respect of religion, the late Morris R. Cohen said that Holmes remained essentially an agnostic; but he added that instead of a personal God, Holmes substituted the "unimaginable whole of reality, which served equally well to teach the great lesson of humility". Apart from the incongruity of applying the term "humility" to the state of being crushed by an overwhelming universe bereft of personality, the portrait is correct. Holmes felt resigned to fate, not called to surpass it.

The climax of Holmes' agnosticism is revealed in a letter written by him near the end of his life to a Chinese law student, J. C. H. Wu, in which Holmes said, caricaturing the words of Simeon when the infant Jesus was presented to him in the temple, "I bow my head, I think serenely, and say as I told some one the other day, O Cosmos—Now lettest thou thy ganglion dissolve in peace."

Holmes' Philosophy Exalted Courage

The question then remains, what is life worth? For lack of convictions, for lack of truth, for lack of morals and of faith, what supplies the meaning of life, what gives a motive for going on?

In his answer to this question, Holmes touches the nethermost depth of unreality and inconsistency. In general, his doctrine proposes an iron cage of action for the sake of action, with a romantic exaltation of courage in the pursuit of unknown goals combined with a hedonist enjoyment of such creature comforts as chance affords. In a speech before the Bar Association of Boston, he declared himself: "The joy of life is to put out one's power in some natural and useful or harmless way. There is no other. . . . With all humility, I think 'Whatsoever thy hand findeth to do, do it with thy might' infinitely more important than the vain attempt to love one's neighbor as one's self. . . . Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself. . . . When it is said that we are too much occupied with the means of living to live, I answer that the chief worth of civilization is just that it makes the means of living more complex; that it calls for great and combined intellectual efforts, instead of simple, uncoordinated ones, in order that the crowd may be fed and clothed and housed and moved from place to place. Because more complex and intense intellectual efforts mean a fuller and richer life. They mean more life. Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it."

This speech drew strong criticism from William James, who said that Holmes seemed "unable to make any other than that one set speech which comes out on every occasion", and he added that to make the joy of life systematic and to oppose it to other duties was to pervert it, "especially when one is a Chief Justice."

The same theme occurs in the conclusion of Holmes' radio speech on his ninetieth birthday. In this speech he made his often quoted reference to the canter of the race horse after it passes the finish line. He then said, "The canter that brings you to a standstill need not be only coming

to rest. It cannot be while you still live. For to live is to function. That is all there is in living.

"And so I end with a line from a Latin poet . . . 'Death plucks my ears and says, Live—I am coming'."

"The Struggle for Life Is the Order of the World"

The "action" theme occurs also in his exaltation of war and the fighting courage of the soldier. He said that moralists and philosophers declare that war is "wicked, foolish and soon to disappear", but that for his own part he believed "that the struggle for life is the order of the world, at which it is vain to repine", that man's "destiny is battle, and he has to take the chances of war", and that "The ideals of the past for men have been drawn from war, as those for women have been drawn from motherhood." Regarding the soldier, he said, "I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use." While war is horrible, he said, its message is "divine", because it leads us to discipline. Some such teacher we need, "that we may realize that our comfortable routine is no eternal necessity of things, but merely a little space of calm in the midst of the tempestuous untamed streaming of the world . . ." And so he says, "Out of heroism grows faith in the worth of heroism. The proof comes later, and even may never come. Therefore I rejoice at every dangerous sport . . . The students at Heidelberg, with their sword-slashed faces, inspire me with sincere respect. I gaze with delight upon our polo players. If once in a while in our rough riding a neck is broken, I regard it, not as a waste,

but as a price well paid for the breeding of a race fit for headship and command."

But, as I have said, Holmes was not consistent. In his search for the meaning of life, he could descend, in another mood, from the romantic idealization of the soldier's sacrifice to lower levels of satisfaction. Thus, in a letter to Pollock, he wrote, "I was repining at the thought of my slow progress—how few new ideas I had or picked up—when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life—victuals—procreation—rest and eternal terror. And I bid myself accept the common lot; an adequate vitality would say daily: 'God—what a good sleep I've had.' 'My eye, that was dinner.' 'Now for a rattling walk —' in short, realize life as an end in itself. Functioning is all there is—only our keenest pleasure is in what we might call the higher sort. I wonder if cosmically an idea is any more important than the bowels."

Law Is the Product of Irresponsible Will and Force

If we pass from Holmes' philosophy of life to his idea of law, the portrait changes somewhat. Viewing law from the standpoint of its ultimate foundations, he regarded it as a product of irresponsible will and force,—a conclusion which necessarily followed from the philosophy above indicated. Yet, on occasion he could talk of "substantial justice" and "fair play", and as a judge, when pressed too far, he could place a judicial restraint upon legislation that violated some irreducible minimum of individual right. The difference between the two attitudes appeared to depend mainly on whether he was theorizing about the law in general or whether he was adjudicating a case. In the former instance, his doctrine reflected the raw existentialism of his philosophy of life; in the latter, he reverted to traditional language of antecedent rightfulness and wrongfulness.

In legal theory, his utterances follow the familiar pattern. As shown,

Holmes viewed life as a struggle between hostile forces. Since the *ultima ratio* was force, the right side was the side which prevailed in the struggle. The same realism applied to law. He defined law as the prediction of the circumstances in which force will be brought to bear upon men through the courts, "the prophecies of what the courts will do in fact, and nothing more pretentious." "So", he said, "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way."

In commenting upon this, Professor Harold Laski says that in his recognition of power in the community Holmes was a Spinoza "proclaiming that might gives to right its letters of credit." Accordingly, Mr. Laski describes Holmes' doctrine by saying, "Rights are not the postulates of a pre-existing framework within which law must work. They are the product of law, maintained as the possession of citizens because that part of the community which has the power to maintain them is prepared to fight to that end. Law, therefore, becomes the expression of the will of the stronger part of society; and the state is the organization of the institutions which give form and coherence to the expression so maintained." In another place, Laski says that Holmes states law "in terms of an irresponsible and unlimited will such as Hobbes himself would have strongly approved." As a result of his philosophy, Holmes was much more concerned, said Laski, "with the ways of attaining ends than with the ends themselves."

Holmes Denied Existence of Natural Law

To Holmes, natural law was a fiction which arose from the fact that certain habits and institutions, such as marriage, property, respect for contractual obligations and some protection of the person, seemed to be necessary elements in any society

which from one's point of view would appear to be civilized. But these were not the product of any ethical *Ought*. They were merely rules that prescribed how we must behave if we wished to live in society. "I see no *a priori* duty", he said, "to live with others and in that way, but simply a statement of what I must do if I wish to remain alive." Pollock disapproved of the attack on natural law because it left no ethical background for law.

The legal positivism of Holmes is further illustrated in his doctrine of external standards. In that doctrine he complained of the confusion which resulted from inclusion of the moral element in law. His point was that positive law is not coextensive with morals; that law deals with external acts rather than with motives; that it means the same thing to the bad man as to the good one; and that it is an actual expression of what the community wants, not a logical deduction from ideal premises. Therefore, said Holmes, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."

Holmes' attempt at clarification is itself tinged with confusion. In the light of his philosophy, his reference to "morals" itself is of questionable meaning. In his philosophy, morals can mean nothing more than what at a given time and place the people think is right (although that, of course, might be the Nazi regime). True, Holmes used the *language* of morals. For example, on the issue of external standards, he defended himself against the imputation of cynicism, saying, "The law is the witness and external deposit of our moral life." But in a universe which

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The National Legal Aid Association: The Lawyers' Red Cross

by Orison S. Marden • of the New York Bar (New York City)

■ Nearly eight persons out of every one thousand in the United States each year are unable to pay for the legal assistance they need. In the large cities especially it is difficult for the man or woman in the lower-income groups to obtain the services of a lawyer. The National Legal Aid Association, a nonprofit organization newly established by the National Association of Legal Aid Organizations and the Standing Committee on Legal Aid Work of the Association, has been set up to assist local communities to meet the needs of the citizen who needs legal assistance that he cannot afford to pay for. Mr. Marden, the Chairman of the Association's Committee on Legal Aid Work, explains the new group in this article.

■ On October 13, 1949, the Recorder of the District of Columbia entered on his official records the charter of a new nonprofit organization, the National Legal Aid Association. Sponsored by the now-dissolved National Association of Legal Aid Organizations and the Standing Committee on Legal Aid Work of the American Bar Association, the new association confidently expects to achieve the stature and prestige of such great national organizations as the American National Red Cross.

The objectives of the new association are briefly these: to encourage and assist the formation of new legal aid organizations wherever needed; to stimulate, develop standards and generally supervise the work of all such organizations, and to correlate their activities to the end that all persons, even if unable to pay, may receive sound advice in legal matters and skilled representation in necessary judicial or administrative proceedings.

The first president of the NLAA is Harrison Tweed of New York, current President of the American Law Institute, and long a national leader in legal aid work. Raynor N. Gardiner of Massachusetts, who has devoted most of his professional career to legal aid work as general counsel of the Boston Legal Aid Society, will serve as executive vice president. Appropriately enough, the three vice presidents are, respectively, Harold J. Gallagher, President of the American Bar Association, the chairman of its Committee on Legal Aid Work, and Reginald Heber Smith of Boston, legal-aid pioneer, who is now Director of the Survey of the Legal Profession. Included on the Board of Directors are prominent laymen and leaders of the Bar throughout the country.

New Association Will Meet Long-Standing Need

The new association will meet a long-standing need in the legal aid

field, and, when properly staffed and financed, will greatly implement the promotional work that has been carried on by the American Bar Association Committee on Legal Aid Work.¹ In the opinion of the American Bar Association committee no development of recent times is of greater importance to the legal profession.

Regular memberships in the National Legal Aid Association are limited to full-fledged legal aid societies, but associate memberships at small cost are open to bar association committees and other groups interested in legal aid work. In addition, a special class of members, known as "professional members", has been created for individual lawyers. Since the dues for professional members are only ten dollars annually, it is confidently expected that thousands of lawyers throughout the country will wish to do their bit by taking these memberships, which entitle the members to the informative publications that will be issued from time to time by the association.

Now that the National Legal Aid Association has been established it is appropriate to examine anew the purpose of legal aid and how the achievement of this purpose can be of major benefit to the legal profes-

1. Advance Program of the 1949 Annual Meeting of the American Bar Association (page 86) Committee on Legal Aid.

sion at this particular time.

American lawyers have always given generously of their time and talent in aiding those who cannot pay for legal services. With the growth of our larger cities, however, it has become increasingly difficult, for a variety of reasons, for the man or woman in the lower-income groups to obtain the services of a lawyer. In rural areas, on the other hand, the lawyer today continues to advise and represent his less fortunate neighbors, just as the country doctor treats those who cannot pay him.

Legal Aid Societies Are Only Way of Meeting Need

In the larger cities experience has shown that the only practical way of meeting the real need is by the establishment of a community law office, open to everyone who cannot pay a lawyer's fee. These organizations are generally known as Legal Aid Societies, and are usually supported by the community-at-large through the local community chest.

Nationwide studies have demonstrated that an average of nearly eight persons in every thousand are each year unable to pay for the legal assistance they need.² Yet, in the United States today there are more than fifty cities with metropolitan populations of 100,000 or more which lack any form of organized legal aid. In many cities with smaller populations the need is proportionately great. This is a shocking situation, for legal assistance when needed is absolutely essential in our democracy. It is, moreover, an exceedingly dangerous condition, because the man who believes that he has suffered an injustice through inability to hire a lawyer is an especially easy convert for the alien doctrines with which we are all too familiar. As stated by a distinguished English judge, Lord Morton of Henryton, at the 1949 Annual Meeting of our Association:

There is nothing that would more quickly turn me into an anarchist than to feel that I could not get justice because the other man was richer or more influential than myself.³
How can we expect the respect for

HOW YOU CAN HELP

1. Encourage your state and local bar associations to carry on an active program of legal aid promotion.

2. Interest yourself and your local bar association in your community's legal aid facilities—are they adequate, competent, decently supported?

3. Take out a professional membership in the National Legal Aid Association by mailing your check for \$10 to the National Legal Aid Association, 25 Exchange Street, Rochester 4, New York.

law that is so essential to the health of our community and nation, if the tools of justice are denied to those who cannot pay for them?

It is indeed surprising that a problem that can be solved with so little cost and effort should be so acute. All that is needed is a well-publicized law office, which can be supported by the community at far less expense than is generally supposed. This cost is negligible indeed when compared with the powder keg such an agency will eliminate. Frequently, a single stenographer and one or two lawyers, full or part time, will suffice; and free space can usually be found in the local courthouse or bar association. Moreover, collections of small money claims for clients will substantially reduce the necessity for financial assistance to indigent persons and help to keep family units together. In other words, the net cost to the community may well turn out to be negligible, because financial assistance to the needy is materially reduced through the work of the legal aid society.⁴

The American Bar Association committee and the new national association are prepared to help in many ways the local leaders who are willing to sponsor the creation of a legal aid society in their community. The actual mechanics of creating and operating such an agency are set out in an informative handbook, published by the American Bar Association committee, which is available without charge. In addition, within the limits of its appropriation, the

American Bar Association committee is frequently able to furnish a speaker for bar association meetings as well as technical assistance to bar association committees.

Community Has Duty To Supply Legal Aid for All

The community that does not provide legal assistance for all its citizens is shirking a responsibility fully as important as adequate provision for hospital care and other welfare services. A broken contract can be just as disastrous and important as a broken leg. A lawyer's help is usually necessary to meet the problems of the deserted wife. In short, legal assistance to the poor is as necessary to the well-balanced community as is adequate provision for medical and surgical care.

Moreover, subversive ideas flourish like weeds among those who believe, rightly or wrongly, that they have been denied justice because of their inability to obtain the services of a lawyer. To quote Judge Conway, of the New York Court of Appeals:

All right-thinking men agree that a person requiring the advice or assistance of a lawyer should receive it whether or not he can afford it; that it is as necessary as that he have the services of a physician when ill, and that a grievance against the administration of justice can do more social harm than suffering on account of lack of hospital facilities.

Chief Justice Vinson has vigorously advocated the extension of legal aid "to every part of this country to protect the rights of those who cannot protect themselves."⁵

The old bugaboo to the effect that the legal aid society takes business from lawyers has been disproved wherever the legal aid society functions. On the contrary, the Bar in such cities has found that legal aid actually tends to bring new clients to lawyers. This seeming contradiction is explained by the fact that a large stratum of society, the lower-

2. Brownell, "Legal Aid and Democracy", 34 Cornell Law Q. 580 (1949).

3. 35 A.B.A.J. 889, 890; November, 1949.

4. For facts and figures, see Brownell, *supra* note 2.

5. "Why Legal Aid in Your City?", a pamphlet published by the Standing Committee on Legal Aid Work of the American Bar Association.

income group, has a curious dread of lawyers, and tends to avoid seeking legal counsel when needed. This basic misunderstanding leads many people, not necessarily those without funds, to seek advice from the notary public and others who do more harm than good with their lay advice.

When a legal aid office is in operation and properly publicized, this great segment of society gradually learns that lawyers are able to help people when they are in trouble, and even more important, that they can help keep a man out of court, that fees are not sky-high; and the word goes around, family to family, neighbor to neighbor.

Legal Aid Produces Understanding of What Lawyer Does

Thus Legal Aid produces, as a sort of by-product, a new understanding of what a lawyer is and does. But this is not all. Many applicants who come to the Legal Aid Office are found to be able to afford a private lawyer, and of course these are refused assistance. Practices vary, but in many communities these applicants are referred to private lawyers from a list supplied by the local bar association, a strict rotation schedule being followed.

Besides those who can afford to pay a reasonable fee, some applicants have claims that a private lawyer would be willing to handle on a contingent fee basis. These also are referred to private practice. It is surprising how many citizens are unaware that lawyers will accept money claims and await the outcome for their fee. Frequently, too, wives do not appreciate that in proper circumstances their husbands may be required to pay all counsel fees in matrimonial cases.

The establishment of Legal Aid takes a great load from those members of the profession who give so generously of their time in helping people who cannot afford to pay a fee. Such lawyers, and their number is far greater than is generally realized, contribute not only the time and cost of actual work done on such cases, but the hidden overhead costs as well. Even where they may

wish to continue such service, perhaps in cooperation with the Legal Aid organization, it is possible to eliminate the screening process, and the time-consuming checking of applicants. The Legal Aid office also eliminates the embarrassing need to refuse private help, as sometimes must be done.

Legal Aid Improves Public Relations of Bar

Not the least important by-product of organized legal aid is in the field of good public relations for the Bar. The very fact that community leaders in the fields of politics, business and welfare turn to members of the Bar for guidance on the formation and direction of Legal Aid is in itself the best kind of public relations. Through the board of directors of the Legal Aid Society, on which lawyers are always represented, this becomes a continuing relationship.

The press is usually eager to report news about Legal Aid, and in this way the general public is kept informed of the contribution of lawyers to Legal Aid. This is particularly desirable, as lawyers have so few opportunities for legitimate favorable publicity, not only because of their professional status, but also because of the confidential nature of many of their activities.

Prompt Action Will Block Legislation Harmful to Lawyers

Current world conditions point up the fact that the Bar must act in its own self-interest. The English, who for so long neglected to make adequate provision for legal advice and representation to poor persons, have now been forced to adopt legislation under which it is estimated that approximately one-third of the population will become entitled to legal advice and representation, both in the lower and middle-income groups, largely through government subsidies. The medical profession in our own country is now agitated because of a proposed national health program. Many people think that the medical profession waited too long, and certainly the English Bar should have acted long ago to stop by con-



Orison S. Marden

Orison S. Marden, who practices in New York City, is Chairman of the Association's Committee on Legal Aid Work. He has been interested in legal aid work for many years, and has been active in that field, working with The Association of the Bar of the City of New York, the New York Legal Aid Society and the National Legal Aid Association.

structive action these trends toward "nationalization" or "socialization" of the professions.

No matter how carefully these governmental schemes are set up, we have learned in this country that the hand that controls the purse-strings will in the long run determine the policies and operation of the agency. The American lawyer does not wish to be "regulated" by government, directly or indirectly, in the practice of his profession.

Within the past few months, our former president, Chief Justice Arthur T. Vanderbilt of New Jersey, has warned the lawyers of his state that government subsidies for legal assistance to the poor, even if administered through the organized Bar, would constitute a dangerous threat to the traditional independence of the American lawyer. He said in part:

The basic strength of the legal profession, like many another profession, is in its independence. Independence does not mean any lack of ability or willingness to cooperate, as we have shown for years in the work of our bar associations. It does mean that we

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Nominations for Officers and Governors

Made by State Delegates at Mid-Year Meeting

■ In accordance with the provisions of Article VIII, Section 2 of the Constitution, the State Delegates met on Tuesday, February 28, and nominated the following to serve as officers and members of the Board of Governors, all to be voted upon by the House of Delegates at the Annual Meeting of the Association to be held in Washington, D. C., during the week beginning September 18, 1950:

President, CODY FOWLER, Tampa, Florida

Chairman of the House of Delegates, ROY E. WILLY, Sioux Falls, South Dakota

Secretary, JOSEPH D. STECHER, Toledo, Ohio

Treasurer, HAROLD H. BREDELL, Indianapolis, Indiana

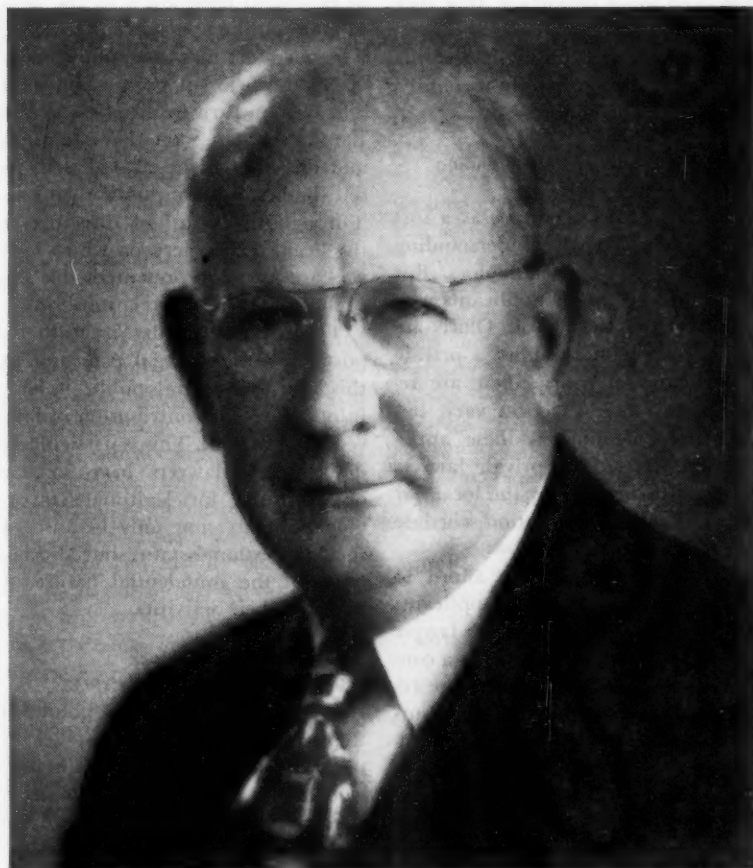
Members of the Board of Governors:

Fourth Circuit, WALTER M. BASTIAN, Washington, D. C.

Seventh Circuit, ALBERT J. HARNO, Urbana, Illinois

Eighth Circuit, FREDERIC M. MILLER, Des Moines, Iowa

Mr. Fowler was born in Tennessee in 1892 and was educated at the Missouri Military Academy of Mexico, Missouri, Castle Heights School, Lebanon, Tennessee, the University of Missouri and Cumberland University. He received his law degree from the latter in 1913, was admitted to the Tennessee Bar in the same year and to the Florida Bar in 1914. He has been in practice in Florida since that time with the exception of the period from 1916-1924 when he was engaged in practice in Oklahoma City, Oklahoma. He is senior partner in the firm of Fowler, White, Gillen,



CODY FOWLER

Blakeslee Studio

Yancey and Humkey of Tampa, and has maintained offices also in Miami since 1939.

Cody Fowler has been for many years an active and enthusiastic worker in the American Bar Association, as well as in his state and local bar associations, being a member of the Florida State Bar Association,

the Dade County Bar Association and the Tampa and Hillsborough County Bar Association. He served as president of the latter in 1933. In the American Bar Association he has served as State Delegate in the House of Delegates, 1941-1944 and 1944-1947, member of the Board of Governors from the Fifth Circuit,

1946-1949, member of the Committee on Judicial Selection and Tenure, 1936-1937, member of the Committee on State Legislation, 1943-1944, member of the Committee on Admiralty and Maritime Law, serving as Chairman from 1939-1942 and 1943-1945, and member of the Committee on Peace and Law Through United Nations, 1949-1950. He was elected Assembly Delegate at the 1949 Annual Meeting in St. Louis.

Mr. Fowler served with the 37th Field Artillery Regiment, 13th Division, during World War I. He married Maude Stewart in 1915 and they have three daughters and one granddaughter.

He has been active in civic affairs as a member of the Tampa Chamber of Commerce, Chairman of the Division of Transportation and Communications of the State Defense Council, member of the American

Legion, serving as Post Commander of Oklahoma Post and as Department Commander of Department of Oklahoma. He is a member of the American Law Institute and the American Judicature Society.

Sketches and photographs of the nominees for Chairman of the House of Delegates and for members of the Board of Governors will appear in a subsequent issue.

Two National Conferences Meet in New York City

■ The National Conference with the American Bankers Association Trust Division (Edwin M. Otterbourg of New York and Robertson Griswold of Baltimore, Md., Co-Chairmen) held an important meeting in New York City on February 8, 1950, at which were considered some of the problems of trust institution advertising relating particularly to "estate planning".

The Conference unanimously adopted and issued the following statement:

Complaints have been made to the National Conference, formed by the American Bar Association and the American Bankers Association Trust Division, that through carelessness or inadvertence, some trust institutions are not abiding by Clause IV of the Statement of Policies adopted by The American Bankers Association Trust Division, on September 29, 1941, and by the American Bar Association on October 1, 1941, which reads as follows:

IV. A trust institution, qualified and authorized by law as a legitimate business enterprise, has an inherent right to advertise its trust services in appropriate ways. It should not, directly or indirectly, offer to give legal advice or render legal services, and there should be no invitation to the public, either direct or by inference in such advertisement, to bring their legal problems to the trust institution. Its advertisement should be dignified and the qualifications of the institution should not be overstated or overemphasized, and it should not be implied

in any advertisement that the services of a lawyer are only secondary or ministerial, or that by the employment of the services of the trust institution, the employment of counsel to advise the customer is unnecessary.

The advertising complained of is of a character which overemphasizes the qualification of trust officers and minimizes or ignores the function of the client's lawyer in the matter of "estate planning".

The National Conference Group recommends that trust institutions in offering their services to the public should emphasize that in matters relating to the planning of an estate, the client should receive the advice of his own lawyer and where substantial insurance problems are involved, the client should receive the advice of his life insurance adviser.

We again repeat that trust institutions should abstain from advising or rendering services in the field of law and that cooperation between trust institutions, life insurance men and lawyers in planning a client's estate is not only desirable but necessary if the public's best interests are to be served.

Under the guise of "estate planning" and "investment counselling", certain lay persons are illegally engaging in the practice of law. This, declared the National Conference of Lawyers and Life Underwriters at its meeting held in New York City on February 9, 1950, is harmful to the public interest and may frequently

lead to disastrous results in the distribution of estates—which cannot be cured after death.

To awaken the public's interest in solving problems, either by life insurance or otherwise, is not only legitimate, but beneficial. The danger to the public arises when nonlawyers, in such situations, attempt to draw legal documents or give legal advice.

The National Conference again draws attention to the following extract from the National Statement of Principles of Cooperation Between Life Underwriters and Lawyers, adopted by the American Bar Association and the National Association of Life Underwriters:

The acquisition of life insurance has become a complex problem by its ever increasing relation to plans of testamentary disposition, wills and living trusts, to partnerships and close corporation contracts, and to problems of taxation. The solution of such problems requires a man to make far reaching decisions. These decisions often are, or, upon the happening of death, become irrevocable. The American public should therefore receive not only expert insurance service and disinterested advice but also skilled and disinterested legal guidance and advice when necessary; both are often required in problems arising out of negotiation for and use of life insurance, and when this is the case, the simultaneous and harmonious attention of a representative of each profession in solving the problems of the same client will provide the safest and most efficient service.

(Continued on page 326)

Party Rights versus Civil Rights:

A Reply to W.D. Workman, Jr.

by Bruno V. Bitker • of the Wisconsin Bar (Milwaukee)

■ In the May, 1949, issue of the *Journal*, W. D. Workman, Jr., state correspondent for the *Charleston [South Carolina] News and Courier*, discussed the line of Supreme Court decisions that opened the polls to Negroes who wished to vote in Democratic primary elections in the South. Quoting extensive language from the cases, Mr. Bitker replies to Mr. Workman.

■ Though no lawyer, W. D. Workman, in his article in the May, 1949, issue of the *JOURNAL*,¹ in phrases free of any legal mumbo-jumbo, ably presents a point of view supporting a constitutional interpretation whereby Negroes could be excluded from voting in party primary elections. The decision that aroused Mr. Workman is the opinion by Judge Waring of the United States District Court for the Eastern District of South Carolina in the *Elmore* case.² In that decision the Court sharply denounces the attempt of the Democratic Party of South Carolina to prevent Negroes from voting in the party primary. Although Judge Waring's opinion has been hailed as evidence of the spirit of the new South toward political equality for Negroes, his critic infers that it is a further result of the spirit which originally moved "a vengeful group of Republicans who sought to punish further the defeated South" by sponsoring the Fourteenth Amendment.

The criticism, too, is of the United States Supreme Court for failing to follow the rule of *stare decisis*. In 1935, the Supreme Court sustained a Texas party device for establishing

a white primary in the *Grovey* case.³ A few years later (1944) it repudiated this rule in the *Allwright* case.⁴ The Court's decision that Mr. Workman likes was rendered, he indicates, by "one of the greatest courts of recent years", whereas the decision which failed to follow precedent, was announced by a court which had "materially changed under an influx of new justices appointed by President Roosevelt".

Court Has Always Felt Free To Reexamine Constitutional Law

It is true that the Supreme Court did within a few years directly reverse itself on a constitutional interpretation. But this practice has long been approved by the Court. Two decades before the adoption of the Fourteenth Amendment the principle that striking departures may take place from previously announced decisions, particularly in constitutional questions, was thus stated by Chief Justice Taney:⁵

I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and

that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

No less an historian of the Court than Charles Warren includes this quotation as a special reminder to lawyers for recognizing the rule:⁶

Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. . . . When the Bar of the country understands this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties. . . .

This Doctrine Used in *Allwright*

This doctrine of judicial philosophy is specifically applied by the Court in the *Allwright* case as follows:⁷

In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the

1. 35 A.B.A.J. 393; May, 1949.

2. *Elmore v. Rice*, 72 F. Supp. 516 (1947).

3. *Grovey v. Townsend*, 295 U. S. 45 (1935).

4. *Smith v. Allwright*, 321 U. S. 649 (1944).

5. *Passenger Cases*, 7 How. 283 at 470 (1849).

6. 3 Warren, *The Supreme Court in United States History* 471.

7. *Smith v. Allwright*, 321 U. S. 649 at 665 (1944).

basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.

Constitutional guarantees, unlike statutes, are statements of principles phrased in the most general language. The Constitution must be interpreted and, as so interpreted, must be applied from time to time, sometimes to similar circumstances and sometimes to varying sets of facts. The interpretation may depend on the climate of opinion, as well as on the conditions and trends of the times. Courts are not themselves instigators of social change. They usually register very slowly the changes that move in the world.

This was certainly true with respect to the Fourteenth Amendment. For more than half a century after the adoption of the Civil War Amendments, the Supreme Court followed narrow interpretations of the rights granted by the Amendment. It was during this period that the South effectively deprived the Negro of the political rights guaranteed him by these Amendments. Various and sometimes ingenious methods were used to accomplish these results. These devices ranged from outright denial of suffrage through physical threats, to literacy tests, grandfather clauses, poll taxes and the white primary.

Primary Was Real Election in Southern States

Long before the first of the two *Nixon* cases⁸ reached the Supreme Court in 1927, the real election in the Southern states occurred in the Democratic primary; the Democratic nominee was always the victor in the final balloting. Since the Fifteenth Amendment forbade any state to deny suffrage to any citizen on account of race or color, the simple expedient to the same result was to exclude Negroes from the party primary. The Texas statute, which expressly so provided, was held bad in

the first *Nixon* case.

Thereafter Texas repealed the invalid statute but passed a new one which sought to avoid the constitutional objection by empowering every political party to set up rules of eligibility to vote in its primaries "through its State Executive Committee". The Executive Committee then determined that Negroes were not eligible. This device for barring Negroes from the primary was likewise condemned in 1932 in the second *Nixon* case⁹ as being in fact state action and therefore prohibited by the Fourteenth Amendment.

Despite the opinion of the Supreme Court on the successive attempts of Texas to circumvent the purposes of the Fourteenth and Fifteenth Amendments, in 1935 in the *Grovey* case,¹⁰ it reached a contrary result. The Court there declined to support the claim for damages of a citizen of Texas against a county clerk for refusing claimant a ballot in the Democratic Party primary election because he was a Negro. In the *Nixon* case the Court construed the action of the party's executive committee as state action, and therefore under the restriction of the Fourteenth Amendment; but in the *Grovey* case it failed to discern state action when the color line was imposed pursuant to a resolution at the party's state convention.

In 1941, after the *Grovey* decision, the Supreme Court in the *Classic* case¹¹ took a good look at the political facts of life and acknowledged that "when the state law has made the primary an integral part of the choice" then the Fourteenth Amendment protected the right of the Negro to vote in the primary election as securely as it does in the final election. In sustaining a criminal indictment for fraud of certain election officials who were conducting a primary election under Louisiana law to nominate a Democratic candidate for Congress, the Court, in the *Classic* case, said:¹²

... Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,

the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1, Sec. 2. And this right of participation is protected just as is the right to vote at the election where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative [*Italics added.*]

When, in 1944, the *Allwright* case reached the Supreme Court, it was conceded that under the *Grovey* case, the Federal Constitution plus local laws against violence would protect qualified Negroes in Texas who voted in the final election although it was a stage of no political importance. But the Democratic Party in Texas insisted that the Constitution would afford no protection in the primary election because it was a private party election.

Allwright Meant Reversal of *Grovey* Case

To sustain the claim of the petitioner in the *Allwright* case for damages against the Texas election officials meant a reversal of the *Grovey* case decided only nine years earlier. Although the *Classic* decision was not grounded upon the Fourteenth Amendment and did not specifically overrule the *Grovey* case, the Court was faced with the logic of the *Classic* case. In the light of that case, the *Grovey* doctrine rendered the Fifteenth Amendment meaningless at the only stage of elections that mattered in Texas. Accordingly, the Court reopened the whole question. It likewise heard rearguments before rendering its decision. It stated

8. *Nixon v. Herndon*, 273 U. S. 536 (1927).

9. *Nixon v. Condon*, 286 U. S. 73 (1932).

10. 295 U. S. 45 (1935).

11. *United States v. Classic*, 313 U. S. 299 (1941).

12. 313 U. S. 299 at 318.

that:¹³

When *Grovey vs. Townsend* was written, the Court looked upon the denial of a vote in a primary, as a mere refusal by a party of party membership. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

Under the *Classic* case, the Court said, the right to vote in a primary election, which is part of the state procedure, was like the right to vote in a general election and thus protected by the Constitution against racial discriminations. The Court concluded that since as a practical matter the right to vote at the general elections is restricted to those nominated at the primaries, this gave the primary proceedings the character of state action.

The broad principle is thus stated by the Court:¹⁴

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

White Primary Is Lost Cause

Whether the white primary in the South was doomed finally under the logic of the *Classic* case or by the specific language of the *Allwright* case, seems unimportant. Likewise it is immaterial whether the Court disregarded *stare decisis* in the *Grovey* case or in the *Allwright* decision. In either event the white primary had become a lost cause. Judge Waring's decision merely emphasized the realities of the primary elections of which the Supreme Court had previously taken cognizance. It is this recognition by the Supreme Court of

the place of primaries in the election process that has so disturbed the supporters of the old political order in the South.

Upon learning of the *Allwright* decision, the Governor of South Carolina lost no time in meeting the challenge to the pure white primaries. What followed seems almost anticlimactic. Within a week after the Supreme Court had struck down the disenfranchisement of Negroes through the exclusive club theory of the primary (and before the Court had acted upon a petition for rehearing) the Governor issued a proclamation convening an extraordinary session of the South Carolina legislature to open April 14, 1944 (the *Allwright* case was decided on April 3, 1944).

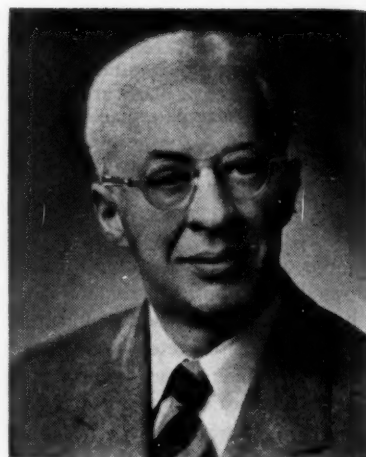
At this extraordinary session the then Governor of South Carolina, after pointing out the effect of the *Allwright* case, said in part:¹⁵

I know that the white Democrats in South Carolina will rally behind you in this matter of repealing all primary laws from the Statute books. I have always believed in action and not merely in words, especially when the protection and the preservation of morals and decency in government is involved. Now is the time for us to act.

I regret that this ruling by the United States Supreme Court has forced this issue upon us, but we must meet it like men. . . .

History has taught us that we must keep our white Democratic primaries pure and unadulterated so that we might protect the welfare and homes of all the people of our State.

The South Carolina legislature thereupon repealed every statutory provision regulating the primary elections and paved the way for repeal of pertinent provisions of the state constitution. It thereby eliminated all statutory control or regulation of political parties and primary elections. Since the State of South Carolina had thus completely renounced control of the parties and their primaries, the political party in control asserted that the primaries became private matters, subject to the determination of its members to include or exclude persons according



Goff Studios, Inc.

Bruno V. Bitker was admitted to the Wisconsin Bar in 1921. He has served on the Commission on Human Rights appointed by the Governor of Wisconsin and on the Milwaukee Commission on Human Relations. He is the author of various articles of legal interest.

to any standards including racial tests.

Negroes Excluded from Party

The Governor had demanded that, "White supremacy will be maintained in our primaries. Let the chips fall where they may!"

Accordingly the chips fell on the Negroes, and the Democratic Party excluded them from membership and from participation in its primary elections.

Thereafter, George Elmore, a qualified elector of South Carolina, and a Negro, instituted proceedings against certain election officials to test his right to vote in the Democratic Party primary. In a lengthy opinion wherein he reviews all of the steps for conducting a primary election in the state and the historical background of suffrage and discusses the pertinent authorities, Judge Waring found an improper denial of petitioner's right to vote. He specifically declined to accord any weight to the

13. 321 U. S. 649 at 660.

14. *Ibid.* at 664.

15. 72 F. Supp. 516 at 520.

private club theory of party primaries.¹⁶

On appeal the defendants again urged the exclusive club theory, comparing the party to a mere private aggregation of individuals. They asserted that the Negro plaintiff "has no more right to vote in the Democratic primary in the State of Carolina than to vote in the election of officers of the Forest Lake Country Club or the officers of the Colonial Dames of America, which principle is the same."¹⁷

The Court of Appeals in reply thereto said that:

Elections in South Carolina remain a two step process whether the party primary be accounted a preliminary of the general election or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the federal constitution imposes.

The use of the Democratic primary in connection with the general election in South Carolina provides, as has been stated, a two step election machinery for that state; and the denial to the Negro of the right to participate in the primary denies him all effective voice in the government of his country. There can be no question that such denial amounts to a denial of the constitutional rights of the Negro; and we think it equally clear that those who participate in the denial are exercising state power to that end, since the primary is used in connection with the general election in the selection of state officers.¹⁸

An interesting sequel to the *Elmore* case appears in two decisions by Judge Waring in the *Baskin* case,¹⁹ affirmed on appeal, arising out of further party attempts in South Carolina to handicap Negroes from voting in the primary. This time the party machinery had been so devised as to make membership in the party open to whites only but to permit participation in the Democratic primary by Negro electors who fulfilled certain requirements not demanded of white electors.

Judge Waring issued a permanent injunction in the *Baskin* case for

substantially the same reasons upon which he acted in the *Elmore* case, noting, however, that between the time of the original application for the temporary injunction and the final hearing, several of the county chairmen made returns showing that they had fully complied with the law and were dismissed as defendants. This act of some of the county chairmen may be further indication that this is no longer the North versus the South, but rather the new South against the old.

Prior to the affirmance of the *Baskin* decision by the Court of Appeals, the United States Supreme Court had again upheld the broad view of the Fourteenth and Fifteenth Amendments in the *Davis* case.²⁰ This affirmed a three-judge court decision on January 7, 1949,²¹ in which an Alabama literacy test was found to be so vague that its purpose, as the court found, was to meet the *Allwright* case and therefore an unconstitutional denial of suffrage. As to the variety and fine means by which the objective of disenfranchising the Negro may be accomplished, the trial court cuts through the methods as follows:²²

The Fifteenth Amendment "nullifies sophisticated as well as simple minded modes of discrimination", and "It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

In the light of the *Classic* and the *Allwright* cases, Judge Waring in the *Elmore* case, could reach no different result upon the then state of the law. He urged, nevertheless, consideration of another and persuasive basis for resolving any doubts in favor of sustaining the broadest application of the rights of suffrage in this country.²³

In these days when this Nation and the Nations of the world are forced to face facts in a realistic manner, and when this country is taking the lead in maintaining the democratic process and attempting to show to the world that the American Government and the American way of life is the

fairest and best that has yet been suggested, it is time for us to take stock of our internal affairs.

World War II Stimulated Interest in Constitution

There has been a resurgence in interest in our basic constitutional rights since World War II. It is accentuated by a realization that in the present international situation, our ideals of human rights constitute our strongest weapon. The failure to vigorously support our constitutional rights damages our position before the world. Unequal treatment among our own citizens, particularly in the field of racial and religious discriminations, is the greatest single danger to our foreign relations. Conceivably it could create a threat to American security.

Consider, for example, our position with respect to the Americas. The Central and South American world is made up of a consolidation of races, a majority of which is not "lily white". A substantial minority is not Caucasian at all. Mexico is 85 per cent Indian by heritage. The West Indies are constituted of more than 90 per cent Negroes. Throughout Central and South America an Indian or a Negro is not a second class citizen. When someone from any of these countries encounters race discrimination in the United States, it is not merely an affront to his blood, it is an insult to his country. Making the Good Neighbor Policy effective becomes increasingly difficult in the face of race discrimination here.

Discrimination likewise affects our position in the Orient. It is true that we support the principles of the United Nations, which confirm racial equality and freedom from discrimination. Nevertheless, our standing is continuously weakened by our actual racial practices, especially toward

16. 72 F. Supp. 516 (1947).

17. *Rice v. Elmore*, 165 F. (2d) 387 at 389 (1947); *cert. den.*, 333 U. S. 875 (1948).

18. 165 F. (2d) 387 at 391 et seq.

19. *Baskin v. Brown*, 174 F. (2d) 391.

20. *Schnell v. Davis*, 93 L. ed. 644, decided March 28, 1949.

21. *Davis v. Schnell*, 81 F. Supp. 872.

22. 81 F. Supp. 872 at 880.

23. 72 F. Supp. 516 at 527.

Negroes, with whom Orientals must feel a common bond as victims. This resentment is further sharpened by the prejudice frequently exhibited to the Orientals in our own midst.

Gunnar Myrdal's remarkable study, so properly entitled *An American Dilemma*, points up the world-wide effect of our attitudes on human rights. It reads in part:²⁴

America is now, for better or for worse, and despite her wishes, a world power. She shares this position with Russia, and she is a competitor with Russia for world leadership. Furthermore, in this day of movies, radio, and a mass press, every nation in the world is aware of what is going on in America, her black spots as well as her white ones. America's treatment of the Negro is rapidly becoming known throughout the entire world.

For a century America has stood to all the world as the most democratic nation, one to be admired and fol-

lowed. . . . Undoubtedly the war-torn nations of Europe desire to follow democratic ways. While they need our economic aid, they, like most people who have to accept help and are thereby indebted, do not love us for that. They love us because we have stood as the nation in which men were free, free to speak, think, and worship as they pleased and to rise economically according to their own efforts, unhandicapped by class or caste barriers. This is our strongest appeal against the Russians and one which we need to propagandize. The American Creed, must, however, be lived up to if other nations are to believe what we say, and lived up to in regard to the Negroes as well as other groups. Europeans, after their recent experiences, well realize that failure to extend equality to one group may mean failure later to extend it to other groups.

Lawyers recognize that in the present world atmosphere our strength is not merely in armaments, or in science. Our first strength is in law

and order; in the continued preservation of those civil liberties which the law assures to all United States citizens regardless of their race, religion or color. Certainly if there is any area of American law in which it is important that no racial distinctions should be permitted, either expressed or implied, it is in the right of an American citizen to vote.

Obviously the law cannot order men to abandon their prejudices. But the law can change the conditions under which prejudices produce results. In this instance the results are not only obnoxious to our constitutional principles but are weakening our national security as well. These results the courts and lawyers must prevent.

24. Abridged edition of *An American Dilemma* entitled, "Negro in America", by Rose; Harper and Brothers (1948), page 319.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1950 Annual Meeting and ending at the adjournment of the 1953 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

An election will be held in the State of New Jersey for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1951 Annual Meeting, and in the States of Maryland, New Hampshire, New York and Oregon to fill vacancies in the term expiring at the adjournment of the 1952 Annual Meeting. The State Delegates elected to fill vacancies will take office immediately upon certification of election.

Nominating petitions for all State Delegates to be elected in 1950 must be filed with the Board of Elections not later than April 20, 1950. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1950.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 20, 1950.

Attention is called to Section 5, Article VI of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with

the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS

Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve

What Is Your Fire Insurance Policy Worth?

The Evils of the Standard Insurance Form

by W. Jefferson Davis • of the California Bar (Los Angeles)

■ The average citizen who buys a fire insurance policy for the full value of his \$20,000 home expects, quite reasonably, that he will be paid \$20,000 if that home is totally destroyed by fire. In this expectation he will be disappointed unless he has been wise enough to read the fine print in his policy. Mr. Davis depicts the dilemma of the average fire insurance policyholder when disaster strikes, and calls for a reform of the fire insurance business.

■ How sound is your investment in fire insurance?

If you placed your fire insurance policy under scrutiny would it stand the test?

Or would you discover, to your dismay, that your policy, in the event of fire, would not be honored for payment by the insurer?

The clamor in our legislative halls for remedial legislation to regulate the business of fire insurance underwriting, and the growing demands for a thoroughly amended Standard Fire Insurance Policy Form have focused the spotlight of public attention on a matter seriously affecting the average householder and businessman.

There are leaders in every walk of life concerned with the present conduct of this enormous business and they unhesitatingly point to questionable practices in some quarters of the fire insurance field and insist that new methods, procedures and contractual bases must be speedily introduced if stricter governmental regulation is to be avoided.

In a word they say that the insur-

ance colossus of America, one of the greatest accumulations of entrusted wealth extant, must clean house as it did a score of years ago, or possibly face another "Armstrong" inquiry similar to the one so ably led by the late Charles E. Hughes.

Property owners subscribe in good faith to fire insurance protection, sometimes under high pressure salesmanship overinsure their holdings and seldom, if ever, realize how easily they might have been victimized through innocent violations of antiquated and inequitable provisions of the so-called "standard" policy. The policyholder would do well to devote one evening to study and analysis of his fire insurance policy. He might be shocked at his findings.

A sense of security is felt by the average fire insurance policyholder. He pays hard-earned money in good faith for a protection against loss by fire and assumes that the term "coverage" implies a fact. In his possession is an elaborately phrased document—customarily the so-called "Standard Insurance Form"—upon which he places his confidence that

his future security against loss is sound. Because he has paid a premium to a representative of one of the companies constituting America's great insurance colossus doing billions of dollars of business each year, he holds the belief that his policy means a dollar-for-dollar protection against loss for himself and his loved ones.

Out of habit the policyholder takes a casual glance at his pretentiously prepared document, notes that the entries on page 1 appear to be accurate, and, without noting the complex and ambiguous qualifications beyond the typed entries that would challenge the interpretation of a Philadelphia lawyer, tucks the paper into his safe deposit box.

He is fully covered against loss—he thinks!

Policy Is Worth Only What Company Will Pay

Put yourself in his place, if you are a fire insurance policyholder. Do you know what your fire insurance policy is worth to you in event of a loss? You would learn through the unfortunate experience of a fire and the resultant efforts to adjust the loss and obtain payment from the insurance company that it is worth just exactly what the insurer decides to pay you despite the value underwritten and upon which you paid the full premium. The insurance com-

company has an odd conception, if any, of the oft-used term "full coverage."

Your conception of the term is this: You own a \$20,000 home. The place cost you \$20,000 or more to build. You buy insurance in good faith, having confidence that the insurer will, in the event of a total loss through fire, reimburse you in the amount for which the property is insured. You bought \$20,000 of insurance and expect \$20,000 in the event of total destruction of your home by fire. You feel you are entitled to full value just as you expect scrupulous dealing and full value in other purchases for your home. Perhaps the thing that has given you greatest confidence in your policy is the large type on page 1 in which such and such insurance company, in consideration of the "stipulations herein named", and so many dollars premium, "DOES INSURE [YOU]" against "ALL LOSS OR DAMAGE BY FIRE" except as hereinafter provided.

You gazed upon a beautiful mirage as you fondly tucked away the new policy in your safe deposit box. You missed the boat, as it were.

Study of Policy Gives You Shock

If you had taken time to study your insurance document you would have been prepared for the shock that the average burned-out policyholder experiences when he seeks settlement of a loss. Then the full implication of the policy phrases "except as hereinafter provided" and "stipulations and considerations specially referred to" hit you between the eyes.

After the fire you consult your policy and the agent from whom you purchased supposed security. You prepare the proofs of loss, complete inventories and file with the company underwriting your loss the necessary papers. You contemplate payment of the principal sum of your policy, in the event of a complete loss, within a reasonable time. Perhaps in a discussion of fire insurance with business associates someone has mentioned that a negligible few fire losses ever are paid to the full value of policies; that the insurance com-

panies scale down losses under a thousand and one devious procedures and claims, and that the average fire loss sufferer settles a claim for less than the value of his policy to escape financial inconvenience or expensive litigation. You give little note to these observations until you join at the scene of your fire the company agent and the new character introduced on the scene at this juncture—the "adjuster".

This noble exponent of equity is the shock absorber of the insurance octopus and emerges at the time of a loss from an octopus-owned, operated and inspired "adjustment bureau" to conduct the three-ring circus that follows your filing of the proof of loss.

Appraiser Resembles Simon Legree

This man knows all the answers the insurance company wants you to have in your dilemma. If you are skilled in your ability to estimate human values, you'll convince yourself in a hurry that he is a "company man". He reflects many of the attributes of Simon Legree, Satan, the county coroner and the oily politician. His professional airs are most overwhelming (he believes) and you are not overly impressed by his regal and austere approach to the subject.

He rakes through the ashes of what was once your home and castle. You believe your eyes when you observe what you have reason to know is a 100 per cent incineration. To you there is nothing left of your home; there is nothing to salvage. "Complete destruction? And you expect payment of the face value of your policy?" He scowls as he makes the observation. "Perhaps we should admit some liability", he condescendingly admits. "I believe we can offer you a substantial sum for partial loss,"—substantial to him means ten per cent. "Look! The stone foundation still stands!" Like an automaton he can see in his mind's eye only the provisions of the section of the policy under "stipulations and conditions" entitled in the Standard Form "Ascertainment of amount of loss".

You heretofore, and subsequent to the fire, complied with the "duties" of insured in case of fire. That is a big order in itself and requires the wisdom of Solomon and the ability of a well-trained lawyer.

You Have To Fight To Obtain What Is Due

Your faith in the integrity of insurance companies now is waning. You foresee a fight to obtain what you honestly believe is due you. All the unimpressive "technicalities" listed by the adjuster, the evasive and questionable "exceptions" he injects into the negotiations and the uncalled-for delays annoy you during a thirty-day period, until out of a clear sky, you are formally notified in writing by registered mail of the "partial or total disagreement of the insurer with the amount of loss you claim". You are told of the company's recognition of the amount of loss, if any, the company admits "on each of the different articles or properties set forth in the preliminary proofs or amendments thereto".

Of course the company offer, as is the custom, is negligible; just sufficient to open the doors for them to require you, under the terms of the contract, to submit to appraisal proceedings.

If, within ten days you and the company fail to agree to the terms offered by the company (the negligible amount offered as settlement in full), after you are notified "in writing", the company demands an appraisal of the loss or part of loss as to which there is disagreement. The company forthwith appoints a "competent and disinterested appraiser". You have five days to do likewise. Then you notify the company in writing you have complied and name your appraiser. You will probably appoint some trusted friend. The policy says he must be "competent and disinterested". You are sure he will be. You wish you could feel the same about the "disinterest" of the company man.

Further delays occur while you await the action of the company's appraiser and the person you have

named. They must select a "competent and disinterested" umpire. You can be forgiven for seeing "red" at this juncture. You ask yourself "What is this all about? Didn't I pay out sound money for protection? Have I bought a leaky umbrella? Does this insurance octopus whose assets have increased one hundred-fold over the years have the temerity to insist my house wasn't worth \$20,000, notwithstanding it accepted premium payments on a \$20,000 valuation? Can it be that the company virtually obtained part of my premium payments under false pretenses by selling me \$20,000 of protection when, in fact (as evidenced by the current impasse) it planned to pay but a part of the "full coverage" and disputes my claim that my house was worth \$20,000? You question the ethics of that deal.

Your appraiser and the company appraiser review the matter, and if they fail to reach an agreement as to your loss, and that is most probable, for your man will not accept the low offer of the insurer, the "umpire" is called in to decide.

The payment to you, if any, is agreed upon by any two of the arbitrators. Guess who will make the decision! Your appraiser and the company appraiser? No! They have already disagreed. So the company appraiser and the kindly "umpire", a gentleman who frequently eats regularly only because of the largess of the insurance companies, get their heads together and give you the bad news.

Settlement Is Less Than Full Value

You receive and must accept the judgment of the "umpire" and company appraiser. You won't get \$20,000. That would set a bad precedent. You'll get but a fraction of the insurance amount of \$20,000 which you understood you bought.

With millions of homes and other properties insured against fire, and with the customary latitude of "over insurance" underwritten by hundreds of concerns, it is easy to understand how company assets have

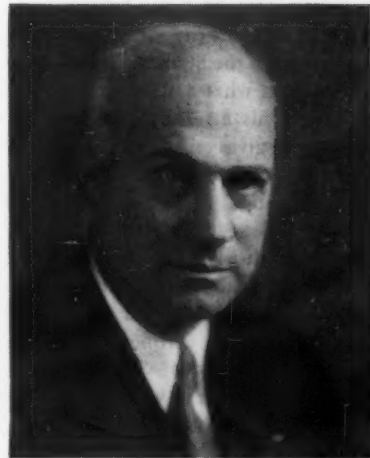
increased more than one hundred-fold into the billions, and why victims of the iniquitous practice look to the government for relief, all in vain, of course, because the subject of federal regulation of insurance is unpopular despite the practices of fire insurance companies that border on almost universal "racket" methods.

If you decline the judgment of the appraisers, within ninety days, you then may institute suit against the company. That means added cost to you. You already have been required to pay the fee of your own appraiser, and half the cost of the umpire's fee and expenses. Now you must have counsel if you proceed against the company. More expenses!

First you placed your problem in the hands of appraisers. The decision was not to your liking, so you proceed with litigation and its attendant costs. Trial of the issue may require long drawn out litigation.

Somewhere along the arduous course of negotiations you obtain enlightenment. Never before have you given such serious and profound thought to the importance of fire insurance and how it affects the welfare of your family. You bought your first policy as you would buy a pair of shoes. You got two shoes. Not one shoe for the price of two. You asked for \$20,000 worth of protection against fire; the glib-tongued fire insurance salesman approved when you mentioned you valued the home at \$20,000 and said you wanted "full protection". You thought you were paying for full coverage. At that time it was not a mythical term to you.

You discover that the insurance codes in many states, perhaps your own, provide that before you make payment of the premium on fire insurance you may, if you choose, require an appraisal by a company agent and after it is agreed the writing of, say, a \$20,000 policy is justified, you are given a "valued policy", under which, in event of total loss, the insurer undertakes to recognize that a \$20,000 insurable valuation existed at the time of the issuance of the policy, and the measure of



Harris & Ewing

W. Jefferson Davis is a practicing lawyer in Los Angeles. He is a member of the California Commission on Uniform State Laws and President of the American Academy of Public Affairs. He has written several books on aeronautical and radio law.

damage in case of loss shall be the amount for which the property was insured. Now, in your dilemma, you wish you had known about the "valued policy" at the time you applied for insurance.

But despite the fact the Standard (old New York) Fire Insurance Form is employed in some twenty-eight states of the Union, and in many if not all states, provision is made for issuance of the "valued policy", comparatively few, if any are written.

In California, residents who desire "valued policies" should benefit by a law of that state that provides for issuance of such policies and the recognition of full value by carriers in event of loss. An arbitrary ruling by the Pacific Coast Association of Fire Underwriters, however, prohibits operation of the beneficial (to the policyholder) statute.

Average Policyholder Does Not Know Law

Obviously the average fire insurance policyholder is not versed in fine points of law, especially the statutes and rulings governing underwriting of properties against loss. Being untrained and unskilled in attempted

interpretation of "stipulations, conditions, agreements or exceptions" contained in the Standard Fire Insurance Form, what a shock it must be to one if his attorney examines his policy and gives especial attention to, say, the "unconditional and sole ownership" clause.

In your eagerness to obtain protection against fire loss you give little consideration to what might seem to you a minor factor. Your agent asks if you own the property in "fee simple". Of course you do. The policy is made out in your name. You have forgotten that the deed to the property names you and your beloved wife as joint tenants (or tenants in common). Of course you want your wife and family protected against loss, although you have had the policy issued in your name only.

Because you innocently failed to comply with this so-called "moral hazard clause" and unintentionally withheld the fact that you were, in fact, not the "unconditional and sole owner"—the insurance company would avoid your policy, holding that the policy was void not only as to the interest of the unnamed co-owner (your wife), but also as to the interest of the person named in the policy—you!

Statistics and records reveal that many outstanding policies today are void and unenforceable because of innocent noncompliance with various "moral hazard" conditions couched in stiff legal phraseology.

Fire Insurance Abuses Are Extensive

Just how extensive is this abuse by fire underwriters in "living up to the letter of the word" in policies issued, and the inclination the insurance adjuster has to take advantage of trivial technicalities, oversights and innocent mistakes on the part of agents of their own and policyholders, is reflected in a study made in a mid-western state. Examination was made in a small community of outstanding fire insurance policies. Of 581 insurance policies on real property examined, nearly 25 per cent were found to be void, due to

innocent violation of the "unconditional and sole ownership" clause. The probers reviewed 255 policies on jointly-owned real property, and found over 50 per cent to be void.

If your property were in Massachusetts, Maine, New Hampshire or Minnesota, you probably would not face entire loss of protection, or even partial recovery, for in these states the so-called "moral hazard" or "unconditional and sole ownership" clause is omitted from fire insurance policies. Allowance in those states is made for a wife's undisclosed and limited interest in property.

In Wisconsin and South Carolina the vicious and devastating clause does not apply to the co-ownership of property by husband and wife.

Why, you ask, can such a situation exist and entrap one who purchased a policy in good faith only to be penalized and deprived of protection through "technicalities"?

Many insurance executives and legal lights in highly organized and efficient legal departments make the feeble claim that undisclosed co-ownership of real property creates a "moral hazard", describing the moral hazard as a "risk resulting from the creation of a temptation for the owner of insured property to destroy it himself in order to realize upon his policy".

They contend that undisclosed co-ownership creates a hazard because the policyholder gains full protection of property in which he has but limited interest. They suggest he might be tempted to destroy the property in order to recover for a full loss and thereby make a profit.

Does it seem justifiable, critics of the system ask, for fire insurance companies to issue such a large percentage of void policies to innocent persons in the hope of occasionally apprehending a law- and policy-violating incendiary aimed at enriching himself through a ruse? Are not the results too meager for the terrific price the companies assess against the public?

The law says that one who wilfully burns his property cannot recover his insurance regardless of the provisions

of his policy, should the facts be presented in the proper tribunals.

Little wonder, then, that from every quarter of the country there arise from time to time vehement demands for reform in the fire insurance practices of supposedly responsible companies.

Over the years the inequities, stumbling blocks and vicious exceptions of the Standard Insurance Form have victimized innocent policyholders, and in many states where constructive changes have been offered in legislative halls the powerful insurance lobby has succeeded in defeating remedial legislation to the detriment of policyholders.

Insurance Companies Insist on Old Form

The insurance octopus prefers to hold the majority of the blue chips in dealing with the public; it insists on clinging to the provisions of the old New York policy form in some twenty-eight states, the revised New York form in some fifteen or sixteen states, and the Massachusetts form in four commonwealths.

The need for modification, clarification and refinement of the Standard Insurance Policy (contract), the elimination of its iniquitous provisions and the adoption of more equitable, honest, forthright and sound provisions in favor of the policyholder today is widely stressed by advocates of sound business ethics.

Many insist it is high time the board and other fire insurance companies of America dispense with the so-called "adjustment bureaus", the nonverified and "chiselling" appraisals growing out of compulsory arbitration conducted by company-controlled appraisals, and approach the matter of fire loss adjustment in a business-like manner and afford the policyholder protection to which he is entitled.

Critics of fire insurance procedures seem to be justified today when they turn the tables and call for the protection of the fire insurance policy-

(Continued on page 346)

Improving Bar Examinations:

Some Suggestions

by James E. Brenner • Professor of Law at Stanford University

■ Raising the standards of the legal profession is one of the most important tasks of the organized Bar. The bar examination, which determines who shall be admitted to the practice of law, is obviously of fundamental importance if higher professional standards are to be achieved. Paradoxically, the bar examination frequently stands in the way of the broad, well-rounded legal training that will build higher standards. In this article, Professor Brenner examines the problem and offers a way around the paradox.

■ Bar examinations! At once the balance stone and the bugbear of our legal profession—the very life stream and the damming pool of our growth!

What subjects should be included in the bar examination? A bar examination should be a test of professional competence in legal reasoning and legal knowledge. Legal reasoning can be tested by well prepared questions in a comparatively small number of subjects. Eight or ten questions would be sufficient if it were certain that all applicants had taken courses that covered the points presented by the questions. This procedure would reduce the regimentation of law schools to a minimum, but it would not provide breadth of content. This is a question of much importance to both the legal profession and the public. If only eight or ten subjects were included in the bar examination it is almost certain that some schools would gear their curricula to the bar examination in a way that would deny their students an opportunity

to secure a broad legal background.

Legal knowledge can be tested only if the scope of the examination is broad enough to provide adequate content. If the legal profession is to protect itself against encroachment on the practice of law by laymen it must make certain that a sufficient number of persons admitted to practice law are trained and qualified to meet the needs of the public for legal services in all fields. If it does not do this, the laymen will step in, just as they have done in fields of taxation, administrative law, labor and titles, and take over work which should be done by lawyers. It is the responsibility of the bar examiners to extend the scope of their examinations to assure the attainment of this objective.

The criticism that bar examinations tend to strait-jacket or regiment law school training is justified in some instances. Where this is the case it is not necessarily because too many subjects are included in the bar examination. It is more likely to be because there are too many subjects

with questions which *must* be answered. There is a very simple but seldom-used corrective for this weakness in bar examinations. The corrective is a more extensive use of optional questions. A bar examination that makes adequate provision for optional questions cannot seriously regiment law school training. The bar examiners are entirely justified in requiring law students to secure training in certain basic or fundamental subjects. It is their responsibility to determine whether an applicant has acquired a sufficient degree of professional competence to entitle him to be admitted to practice law. Professional competence may rightly include training in the basic subjects. The number of basic or fundamental subjects need not be more than eight or ten.

The following outline provides for a bar examination that requires only ten subjects that "must" be covered to qualify for admission to practice. In studying for admission to practice law, these subjects are "musts" so far as coverage is concerned, but one or more of these subjects may be omitted in answering the questions in the bar examination if adequate provision has been made for optional questions. The "must requirement" is satisfied by a certificate from a recognized law school that the applicant has satisfactorily completed courses in all of the "must subjects".

In states where applicants are not required to attend law school an affidavit of completion would be accepted in lieu of a law school certificate.

List of "Must" Subjects Is Proposed

Law school teachers, bar examiners and others may differ as to subjects that should be included in the "must list" but this difference is not likely to be serious or to involve more than two or three subjects. The following subjects are suggested for consideration for the "must list". The list can be added to or subtracted from as may seem desirable.

1. Contracts
2. Torts
3. Real Property
4. Criminal Law
5. Evidence
6. Equity
7. Taxation (Included to make certain all applicants have some familiarity with Taxation)
8. Corporations
9. Trusts
10. Constitutional Law

The following is a suggested *second* list of subjects to be included in the bar examination.

1. Community Property (Not to be included in non-community property states.)
2. Wills
3. Conflict of Laws
4. Pleading and Practice
5. Agency

The purpose of the second list is to add to the "must" list a group of subjects of sufficient importance that one question on each of these subjects should be included in each examination.

Here again there may be a difference of opinion as to which subjects should be included but this need not affect the result that is being sought—an increase in the breadth of the applicant's legal knowledge without regimenting law school training.

The following subjects are suggested for inclusion in a *third* list. This list is made up of subjects that

are considered "electives" in most schools. Not all these subjects need be included in each bar examination, and there should be some variation from examination to examination in the subjects selected to further enrich the content of the examination.

1. Administrative Law
2. Bills and Notes
3. Corporation Finance
4. Creditor's Rights
5. Domestic Relations
6. Federal Jurisdiction
7. Future Interests
8. Government Regulation of Business
9. Insurance
10. Labor Law
11. Legislation
12. Mortgages
13. Municipal Corporations
14. Personal Property
15. Persons
16. Public Utilities
17. Sales

Other subjects can be added or dropped from the list if it is considered advisable to do so.

The three lists include a total of thirty-two subjects, a very formidable list so far as numbers are concerned. If applicants were required to answer questions on all these subjects serious regimentation of law school training would be inevitable. This is voided by providing optional questions in each session of the examination. This provision applies to *all sessions* of the examination, not to a part only. The applicant has a choice in each session and is not required to answer a single specific question in the entire examination. The applicant has an option even in the subjects in the "must list". Although he must submit a certificate or an affidavit that he has covered each of the subjects in the "must list" in his preparation for admission to practice, he need not answer questions on all these subjects.

Neither Schools Nor Examiners Should Be Regimented

This is of much importance. An instructor should not be regimented

as to the content he covers in a "must subject" any more than the law school should be regimented as to the subjects that are taught. On the question of regimentation the schools have been quick to voice objections to the bar examiners telling the law schools which subjects they should teach, but they frequently overlook the fact that the bar examiners should not be regimented in the performance of their duty any more than the law schools.

It is the responsibility of the bar examiners to determine whether an applicant is competent to be admitted to practice and it is not for the law teachers to tell the bar examiners which subjects they can or cannot include in their bar examinations. Just as the law teachers know best which subjects and which content provide the best material for training purposes, so the bar examiners as practicing lawyers should know best which subjects provide the best material for determining competence for admission to practice law.

This statement does not mean that the applicant should be subjected to an examination to test *experience*. This might have been proper in the days when law office training was the accepted means of preparing for admission to practice law. Today the law schools recognize that they cannot teach experience because of the lack of time and facilities. Even if law schools desired to teach experience they are not equipped to give this type of training. They can expose students to lectures on the elementary phases of "how to do it" but this is not the equivalent of experience. To acquire experience young lawyers must have actual on-the-job training.

Since applicants for admission to practice law are not presumed to be experienced practitioners, they should not be examined upon the practical problems with which lawyers should be familiar. They should be examined upon the theory of the law and the application of the theory to specific cases. That is what is taught in law schools. That is what

a graduate of a law school should be expected to know. That is what examinations should be geared to test.

If these basic precepts are adhered to both by law teachers and by bar examiners there need be no conflict of ideas as to bar examination content, providing optional questions are included in *all* sessions of the bar examination. It is just as much a violation of the concept of optional questions to require an applicant to answer all questions on basic subjects as it would be to require him to answer specific questions on elective subjects. It is taken for granted that all law teachers do not cover exactly the same content even in the basic subjects. One teacher may consider one part of the subject more important than another and give more time to the development of that part. He may not even touch upon some parts of the subject. For effective teaching each instructor must be free to use his discretion as to what he will cover and what he will omit from his courses.

If a bar examination includes a question on reformation in equity and the applicant *must* answer the questions even though it has not been covered in his course, he is being examined upon subject matter with which he is not familiar. This might be true of a question on illegality of contracts, or any one of dozens of similar cases. The applicant should be protected against situations such as these by providing optional questions in the case of the basic subjects as well as in the case of electives.

Bar examinations should include questions on all the subjects included in the "must list" and in the second list of basic subjects. Additional questions on as many subjects as are necessary to provide the number of questions desired should be selected from the elective list.

Whether the examination should cover one, two, three or more days is a question of determining how much time is necessary to make an accurate evaluation of the competence of the applicants as to legal reasoning and legal knowledge. One

day would be sufficient to make an accurate evaluation of the applicant's legal reasoning ability. A determination of the applicant's legal knowledge takes a longer time. Three days is suggested as the most desirable period for the examination. Each day should be divided into two sessions, each three and one half hours in length. Six questions should be included in each session making a total of thirty-six questions for the entire examination. Applicants should have the option of answering any four of the six questions in each session. This would require each of the applicants to answer twenty-four of the thirty-six questions, and would allow fifty-two minutes to answer each of the questions selected.

Administrative Difficulties Should Not Stand in the Way

The objection has been raised that the inclusion of optional questions would cause administrative difficulties and for that reason the number of optional questions, if any, should be very limited. The work involved in preparing the examination is necessarily increased as the number of questions is increased, but administrative difficulties should never be permitted to stand in the way of a better bar examination. Such difficulties, if any should appear would be a challenge to the bar examiners to overcome them if their efforts will be rewarded with a better bar examination.

Applicants occasionally object to optional questions, stating that it takes too long to study all the questions before beginning to write the answers. There are two solutions to this. First, an applicant who is properly prepared need not concern himself about studying all the questions before selecting the four which he desires to answer. The more effective way to proceed is to study the first question. If the applicant is familiar with the subject matter and the legal principles involved he should answer that question. He should then study the second question. If he is in doubt about the subject matter or the principles of law to be applied he should

skip question number 2 for the time being and study question number 3. If an applicant will proceed in this manner he will usually have answered four questions by the time he has considered question five or six. If not he can then reconsider the questions not answered and select one or more as required to meet the quota of four. The second answer to the objection that it takes too long to study all six questions is the length of time allowed for answering each question. Fifty-two minutes is the time allowed for each question to be answered. This is more time than allowed by the bar examiners in any state but one. This allows ample time to look over all the questions in the group before starting to write the answers if the applicant desires to do so. However, as already pointed out, the more efficient way is to take the questions and answer them in order, leaving to the last those about which there is any doubt.

Not all subjects are entitled to the same weight in the examination. There should be two or more questions on the more important subjects and only one on an elective subject. Going back to the list of subjects previously enumerated it is suggested that the subjects in the "must list" be weighted as follows:

	Questions
Constitutional Law	2
Contracts	3
Corporations	2
Criminal Law	1
Equity	2
Evidence	2
Real Property	2
Taxation	2
Trusts	1
Torts	2
Total	19

In the second list of basic subjects one question should be included in each of the following:

	Questions
Agency	1
Community Property, (substitute another subject in non-community property states)	1
Conflict of Laws	1
Pleading and Practice	1
Wills	1
Total	5

This makes a total of twenty-four questions—thirty-six are needed. Twelve should be provided from the elective list. Of the subjects listed in the elective list select twelve and include one question on each of these subjects. This makes a total of thirty-six questions.

It is important that a proper balance be maintained in assigning the various questions to the different examination periods. If six questions are included in each period, four of the questions assigned to each period should be chosen from the "must list" and the second "basic course" list. The other two questions should be chosen from the list of elective subjects.

Applicant Would Have Choice of Questions

In writing the answers to the bar examination each applicant may choose four out of six questions to be answered. Four of the six questions are on "must" or other basic subjects. The other two are on elective subjects. This combination permits an applicant to choose all questions to be answered from the "must" and other basic list, or he may choose as many as half of the questions to be answered from the elective list, or he may choose any combination in his selection of four questions out of six in each period. Whatever combination he chooses, he must still present a certificate or affidavit showing that he has covered all of the ten "must" subjects in his preparation for admission to practice. The certificate need not show that any particular content has been covered, only that the applicant has satisfactorily completed a course in each of the "must" subjects. This is the only regimentation to which he is subjected.

How much of the applicant's time is required in covering the "must" list in law school or in his preparation for admission to practice law? Law schools require an average of approximately eighty semester units of work for graduation. The subjects in the "must" list make up approximately forty-five semester units of the eighty required for graduation.

The second basic list, which includes additional subjects required for graduation by most law schools, makes up an additional thirteen semester units. The "must" list plus the second basic list requires approximately fifty-eight semester units, leaving about twenty-two semester units for elective courses. This permits a law student to take one fourth or more of his law work in the elective fields, and provides an answer to the regimentation difficulty that exists in so many jurisdictions where a student, keeping his eye on the bar examinations, must do all of his eighty semester units of law study in the fields that are "musts" for a bar examination with no optional questions.

Much of the difficulty of the past is the result of the failure of the bar examiners and representatives of the law schools to get together in their respective states to consider jointly the problems with which both groups are vitally concerned. There need be no conflict in solving these problems if they can be jointly considered. Serious conflicts will exist if each group goes its own way without thoroughly understanding the problems of the other. So-called committees on cooperation between the law schools, the bar examiners and the Bench have existed in a few states for a number of years. Where these committees have met regularly two or more times a year and have sat down together to earnestly consider mutual problems, satisfactory solutions have been found to most of their difficulties. In these jurisdictions where there are no committees on cooperation immediate steps should be taken to provide them. Where committees have been appointed but are not spending a sufficient amount of time studying the unsolved problems of the bar examination system and the requirements for admission to practice law, steps should be taken to activate them in a greater degree. Personnel changes should be made where necessary to bring these committees the ablest lawyer, law teacher and judicial talent available.

One of their problems is always

what subjects and how many questions should be included in the bar examination. It is a difficult problem to resolve satisfactorily if each group goes its own way, but a comparatively simple one if these groups will only get together and seriously study the problem. By this is not meant meeting and simply going through the motions of considering the problems. Much study and research preceding the meeting is required of each of the members if satisfactory results are to be secured. Correct answers to problems such as these do not come as a matter of intuition or happen-so. They are the result of careful thinking and study.

After a decision has been made regarding the subjects to be included in the bar examination, there remains the problem of drafting the questions. Most any lawyer or law teacher can throw ideas together and come up with some kind of an examination question. The range will extend from the memory or encyclopedic type of question to one that is complicated with facts and so vague as to legal points that it has no value as a testing device to determine competency for admission to practice law. A question that includes a difficult point of law and is intriguing to a lawyer may not be a good bar examination question. Drafting good bar examination questions is a skill that few acquire.

Good draftsmen are most likely to be found among those who are devoting a substantial amount of time to preparing examination questions. Committees on cooperation which have carefully investigated this problem have reported that the best draftsmen of bar examinations are found among the law teachers. Since the bar examination should test what an applicant has learned in law school it would seem to follow that law teachers would be the ones best equipped to prepare the bar examination questions and that the law school type of questions should be used in the bar examinations—not the encyclopedic or memory type. The use of law teachers as draftsmen

of bar examination questions is no longer an experiment in the few states in which their services have been used. The results have been excellent and the bar examination has been developed into a testing device with a degree of accuracy in screening out incompetents that was not thought possible a few years ago.

The difficulty with this procedure

is the cost. This is true also of many of the other requirements necessary to produce a good bar examination system—the present cost is prohibitive in many states.

In these states the answer to the problem seems to lie in a national bar examination. It costs as much to build a good bar examination in a state with a few hundred lawyers

as it does in a state with many thousand lawyers. Why duplicate this cost in forty-eight states and in the District of Columbia? Why not have a national bar examination that is geared to law school training? One that can be used in any state and that is sufficiently financed to assure the best bar examinations possible to every state.

The American Law Institute was organized about twenty-six years ago as a charitable corporation under the laws of the District of Columbia "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work".

Its first undertaking was the *Restatement of the Law* which covered ten common law subjects. Its usefulness is bespoken by the fact that already it has been cited by the courts 17,000 times. This twenty-year work was made possible by the generosity of the Carnegie Corporation. The leader in the work and the man without whom it would never have been done was William Draper Lewis who died recently at the age of 82 with his work well done.

In its other undertakings the Institute has necessarily looked for grants from foundations or individuals since it has no endowment and the membership being 1,000 and the dues \$15 annually its income covers only bare overhead. We need more members of the right sort, meaning those who are well qualified and sufficiently interested to participate at the annual meetings in the actual work of the Institute.

When the *Restatement* had been completed and it seemed there was no great demand for coverage of additional subjects, except possibly in the field of corporations and business associations, the Institute turned to the preparation of a Commercial Code to be submitted for adoption by each state legislature and by the

Congress. In this work it had as a side partner the Conference of Commissioners on Uniform State Laws. The work is almost completed and it is contemplated that the Code will be submitted by the Conference to the legislatures of the states which meet in 1951.

Emboldened by its apparent ability to draft legislation, the Institute pursuant to suggestions from members of Congress, the Joint Congressional Committee on Taxation and representatives of the Treasury Department, has undertaken the preparation of a federal income tax law, under another grant from the Falk Foundation. We have no illusion that it will be possible to prepare a statute that will be promptly and unanimously adopted by the Congress and the legislatures of forty-eight states, acclaimed by the Treasury and the Bureau of Internal Revenue, understood at a glance by lawyers and laymen and administered without litigation or controversy. We believe, however, that something will be achieved in improvement of the present situation.

Finally, pursuant to the suggestion of the American Bar Association, the Institute entered the field of continuing legal education on a national scale. The Carnegie Corporation primed the pump with a grant which ought to suffice to put the project on a self-sustaining basis if it receives the sort of support from the various state and local bar associations which they ought to give it. The difficulty is that many of the bar associations are committed to the policy of making such things available to their members without charge. At the same time, the dues

are such that there is no fund from which the association itself can pay the necessary and proper expenses.

A joint committee of the Institute and this Association, sometimes called the Committee of Twenty-Two, is the governing body. John Mulder is the Director in Philadelphia and James Brenner of the Stanford Law School is Director of the Western Area.

The Committee has published three pamphlets on the preparation of tax returns, estate planning and the preparation of partnership agreements; others are in course of preparation. In the last two years, institutes have been arranged in about a dozen states and plans are well under way in five or six others. This statement does not include New York, California, Texas and some other states where continuing legal education has been established entirely on intra-state initiative. It is essential, of course, that there be something more in each state than a single annual institute. Continuing legal education must be spread throughout the area of each state so that lawyers in the smaller cities and even in the rural districts may have the advantage of it. And, in the appropriate cities, sessions should be held several times during each year and become more or less automatically permanent from year to year.

We need the help of every lawyer in the country to pass along the message by example as well as by spoken word that the Bar must continuously educate itself so as to better serve its own interest and the interest of the public.

HARRISON TWEED

President, American Law Institute

"Books for Lawyers"

THE AMERICAN SUFFRAGE MEDLEY. By Dudley O. McGovney. Chicago: The University of Chicago Press. 1949. \$4.50. Pages 195.

In the same manner that a lecturer states that his speech will probably be dull, the author of *The American Suffrage Medley* introduces his book to the reader by recounting that he had been advised to rewrite the manuscript before publishing it, that he was warned that he should have substituted conclusions for the evidence establishing the facts, but that he rejected what he termed "wise advice", choosing, he declared, "to leave the reader wearily to work his way through the evidence."

As if the above attempt to discourage the prospective reader were insufficient, Professor McGovney prefaces his outline of the book by making the naïve statement that all but a very few Americans believe that all adults except those confined to penal institutions and those of unsound mind should have the privilege of voting. Then just as the reader decides to close the cover in despair, the author sums up his objectives and outlines his presentation of the subject matter revealing completeness, conviction and courage, and if interested in this problem the reader finds it impossible to lay aside the book until the last page has been read. It should be added that the simile to the lecturer ends with the introduction, for while a speaker generally fulfills his prediction of dullness, the author of *The American Suffrage Medley* leaves no weary reading in subsequent chapters.

Establishing the need for suffrage reforms through the presentation of factual data, Professor McGovney proposes that the only adequate means for ending the medley of disfranchising restrictions is by an amendment to the Federal Constitution. He would grant to all adult citizens who are of sound mind, and who are not inmates of penal institutions, the constitutional right to vote, provided that they have satisfied a resident requirement of six months in the state or territory and three months in the voting precinct. As an alternative proposal, Mr. McGovney would permit educational qualifications as a prerequisite, if they are established and regulated by Congress on a uniform basis. The amendment would apply to primary as well as general elections, terminating the white primary controversy.

Contrasted with the Fifteenth and Nineteenth Amendments, the author's recommendation is novel, for while the former were negative in nature, prohibiting discrimination because of race or sex, the latter affirmatively confers the right to vote on practically all adults.

Many readers will agree that the author's declaration to the effect that all but a few Americans believe that all adults of sound mind should vote is not supported by the facts. But while there are many that would disfranchise our citizenry because of color or because of economic status, the disfranchisers represent only a minority who have succeeded because of the indifference and the ignorance of many of the majority. The indifference is disappearing and

ignorance will necessarily follow close behind.

Although the Constitution as originally adopted in 1788 provided that the voting qualifications established for the election of state officials would apply in national elections, no regulations or limitations of these qualifications were incorporated into the Constitution. Except for the restrictions imposed by the Fourteenth, Fifteenth and Nineteenth Amendments, the states still prescribe the qualifications for voters in all elections.

The differences in qualifications still prevail and, although changes have been made in all the states, in some instances the modifications have been regressive in nature. Consequently, the only uniformity is in the multifariousness of the suffrage restrictions.

In one state there remains a vestige of the freehold requirement, while in another there exists a deviation from the general pattern of the minimum age requirement. Thirty-two states require more than a year's residence, while eleven impose a shorter period. Disqualification because of crimes ranges from forfeiture of voting rights for the remainder of the convicted person's life to deprivation only for the period of confinement. While thirty-seven states disfranchise mental defectives, eleven jurisdictions make no legislative provision for disqualification for this reason.

Turning to educational qualifications, we find either reading or writing tests, or both, are demanded as a prerequisite to voting in seventeen states. Generally, the tests are administered by local election officials who select the phrase to be written or construed and who then pass on the applicant's qualification. The statistics on the number of Negroes who vote in southern states having this restriction speak for the manner in which educational tests are often administered.

A carryover from a type of economic classicism that dates back to the colonial period, the poll tax disqualifies citizens in seven states. Some members of Congress have attempted to mitigate the effect of poll tax restrictions by introducing bills that would abolish poll tax prerequisites in national elections. Professor McGovney maintains that such laws, if enacted, would be unconstitutional. The author forcibly argues that while Congress may regulate the manner of holding elections, only the states have the power to determine the qualifications of voters. Land owning and tax paying requirements were considered to be proper qualifications in 1788, leading the author to believe that, although the law would purport to regulate the manner of elections, it would be in effect a determination of the voter's qualification. He predicts the Court would recognize the regulation as being the latter.

The American Suffrage Medley was published posthumously, the author having passed away in October, 1947. New developments between the date of writing and the date of publication were added by Edward L. Barrett, Jr., of the University of California.

The book is a fitting climax to a distinguished career as a teacher of constitutional law; the author has used his technical knowledge to expose and to protest against practices which many of us believe to be inherently un-American. His study culminated in a proposal that, if accepted, will result in the elimination of the iniquitous practice of disfranchising American citizens because of their race or economic status.

To anyone, whether lawyer or layman, who believes that an intelligent, interested and representative electorate is the heart of our republican form of government or to anyone who wants the facts with relation to suffrage, I unqualifiedly recommend this book.

DONALD KEPNER

Rutgers University Law School

READINGS IN AMERICAN LEGAL HISTORY. By Mark De Wolfe Howe. Cambridge: Harvard University Press. 1949. \$7.50. Pages x, 529.

The past twenty years have witnessed the introduction of a vast amount of "nonlegal" material into law school casebooks, courses and curricula. Perhaps the use of the word "nonlegal" is itself a relic of the time prior to 1930. Whether the cause was the original success of the Brandeis brief, whether it was the dissatisfaction, in the maturity of law school as opposed to law office education, with the deadliness of three years of strictly technical education, or part of a general recognition of the need for integration of human knowledge, need not concern us. These two decades have witnessed as thorough an evolution in the methods of legal education as there has been since the introduction of the casebook itself.

In this process there has been an expressed desire to instruct in American legal history. Schools have long offered courses in "legal history" or in the development of legal institutions. Indeed, in part the technique of the casebook itself is often historical, aimed, however, at the development of a rule or doctrine. But American legal history has been neglected except in the fields perhaps of court organization and constitutional law. This book is the result of a decision to offer the course as a second-year elective in the Harvard Law School.

Professor Howe, therefore, in the midst of other obligations, set out to fill an immediate need and he has admirably succeeded. His collection of readings is from the sources themselves, with textual introductions and transitions which he prepared. His field is narrow, both in topics and in time and geography. He has concerned himself with five subjects: the state of English law at the time of the colonization of Massachusetts; the acceptance or rejection of English law during that period, following the Revolution, and during the

westward expansion of the nation; the peculiar problem of such acceptance or rejection in a federal union of sovereign states; the American movement toward, and from, codification; the specific application of the first two of these topics to the Massachusetts Bay Colony.

He himself admits that the "materials are concerned with a selected group of problems and a limited number of periods." He states that the decision thus to limit the volume was dictated by circumstances—the time element primarily. But he has blazed a trail. His decision to emphasize the law of colonial Massachusetts is likewise understandable. One who has his roots in upstate New York might make another choice of problem and material. The acceptance of some parts of Dutch law as well as of English law during the history of colonial New York would be a fascinating field of research for someone who would follow in Howe's path.

It should therefore be emphasized that this book is a beginning in a neglected area. The subject will be variously treated by those who follow. Howe's choice of a major theme is fortunate. The fundamental fact of acceptance of English law and technique was of tremendous importance. Perhaps the development was the easier because of the faith that in applying "common law" courts were applying the law of God—as well in England, at about this time, as in Massachusetts Bay—with all that means in result, reasoning and techniques of argument.

Law students will find the method of this book familiar, for they are used to going to sources. Whether the entire field of American legal history can be covered in this way is doubtful. Perhaps it is best for the student to be introduced—no matter what time or place of beginning interests him—to an interest in American legal background in a small area and during a limited period of time. More than that cannot be attempted in a two-hour course. And most students will not feel able, with other demands, to

give more to it. They will be well rewarded—more than they realize—by giving as much.

JOHN W. MACDONALD
Cornell Law School

ANNUAL SURVEY OF AMERICAN LAW, 1948. *New York University School of Law. 1949. \$10.00. Pages lxxvi, 998.*

This is the seventh such survey by the faculty of the New York University School of Law. Appropriately enough, it is dedicated to Chief Justice Vanderbilt, who as Dean Vanderbilt wrote the Foreword in previous years. The series is now about as current as it is likely to be: the 1948 volume was off the press in mid-1949.

The latest volume lives up to the tradition of scholarship and service to the profession which the series has established. Its form and outline are substantially unchanged. War powers, crime and delinquency, and price control no longer rate essays; admiralty and shipping has been added, and landlord and tenant. The scope is encyclopedic: in addition to such standard subjects as constitutional law, contracts and evidence, there are essays on the United States and the United Nations, coöperatives, and legal history.

The number of cases cited is well over three thousand, as in the 1947 volume, but the text is nearly 200 pages shorter. Most of the shrinkage is in "Part One—Public Law: In General", particularly in the treatment of constitutional law and of civil rights. The compression could well be carried further in this part. For a good deal of it overlaps material in later sections such as public utilities, the antitrust laws or criminal procedure. Thus the doctrine of *forum non conveniens* turns up under conflict of laws and constitutional law in Part One, under the antitrust laws in Part Two, and under civil remedies and procedure in Part Four; it is not mentioned under transportation law or corporations in Part Three, where the same

cases would be appropriate. Some overlapping is inevitable, perhaps desirable, but usually a cross-reference would be sufficient; it is hard to justify a full-dress statement of migratory divorce cases first under conflict of laws, then under constitutional law, and finally under family relations and persons.

The volume can and does serve one purpose very well: it calls the reader's attention to developments in the law and in the literature of the law. It should be especially useful to those who concentrate in particular fields but like to know something of developments outside them. Sixteen pages on the antitrust laws or thirty-four pages on federal taxation will not be very helpful to the specialist. But all of us need to know something on these subjects, and these essays tell us where the battle is hottest.

There are other functions that such a volume cannot serve well and probably should not try to serve. One is to substitute for digests and indices. A digest or index would be more usable in tabular form; it would need more cross-referencing; it should be more complete. Unlike digests, these essays should be designed to be read through. For the most part they are; but occasionally one finds citations multiplied on matters of routine, or a series of abstracts of cases without indication how their significance extends beyond their own facts. The result is of course that the reader develops a slight case of the same kind of intellectual indigestion he would get from sustained reading of a dictionary.

On this score the essays on traditional "private-law" subjects like contracts or agency do better than those on constitutional law or administrative law. The number of contract cases is so vast that the writer cannot possibly achieve completeness of citation in the space available, much less abstract all the cases. As a result he confines himself to a few matters he thinks interesting or important, and explains why.

These essays cannot exhaust the innumerable subjects on which they touch. They do well enough if they find and describe significant developments, summarize their settings, and point out their importance. Final analysis and resolution of complex and hotly-controversial issues may properly be left for other forums. It is not clear that anything is added to the survey by the surveyor's parenthetical assertion that he adheres to one side of a controversy rather than the other. In all humility it is submitted that next year the blue pencil should be used more freely on references to a minority opinion "with which it is easier for this critic to agree." Adequate room for expression of the critic's personality can be found in the realm of selection and emphasis.

These criticisms are petty, even captious; it only remains, you may say, to complain of the proofreading. And indeed it is so: portions of the book do seem to have too many typographical errors, possibly the result of the extraordinary rush that must have been required to get the book out so soon after the end of the year. Perhaps a little less speed would make possible a little more thorough editorial work.

The defects complained of, if such they be, do not affect the merit or the usefulness of the volume as a whole. If I seem to carp, please remember that others have adequately sung the praises of previous volumes in the series, that this volume is probably even better than its predecessors, and that my object is only to help make the next volume better still.

ROBERT BRAUCHER
Harvard Law School

THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY AND POLITICS. *By Fritz Grob. Foreword by Roscoe Pound. New Haven: Yale University Press. 1949. Price \$5. Pages 402.*

The subtitle indicates this volume to be a study in law, history and politics. It is more than that. It is a prime study in semantics and one

of the most practical, well-balanced and significant contributions to that growing field that has come from the presses during the past year. Similarly from its treatment of the subject of war and peace, it is obviously a work in the field of international law, but it is again much more than just that. As the eternally prolific Pound says in a succinct foreword: "Thus the problem to which Dr. Grob has addressed himself is one of law and of science of law generally. It is not confined to international law. Dr. Grob has made a real contribution to analytical jurisprudence."

In order to evidence the fact that our notions of what is war and what is peace are decidedly relative and subject to policy, politics and expediency rather than to strict definition—legal or otherwise—the author draws first from history of the past one hundred and fifty years for illustrations of varying situations in which doubt as to the exact character of events was amply justified by the way the events were treated by the participants and by the rest of the nations. He then draws his conclusions from these instances in a concluding theoretical section.

He cites initially the loose use of such terms as war, peace, state of war, state of peace, *de jure* and *de facto* war, and particularly the new term, nonbelligerency, as distinguished from neutrality, as instances of the absence of precision in definition. It has often been said that states are either at war or at peace, or so it would seem, but "there may be operations, short of war, a twilight zone of war, so to speak, and secondly . . . states, instead of being at war pure and simple, may be at war only to a limited extent." Such a condition of operation short of war is variously referred to as intermediate state, state of hostilities, measures short of war, imperfect war, limited war, partial war, incomplete war or quasi-war. The French blockade of Argentina in 1838 and our own so-called punitive expedition against Villa in 1916 in Mexico are cited as instances

indicative of the plethora of perplexing terms employed to cover anomalous situations.

The author turns next to consider cases in which authorities differ as to whether the events occurred in peace or war and some in which battles were fought allegedly in peace times. The American naval operations against France from 1798 to 1800, the shoot-on-sight order of President Roosevelt in late 1941 as against Germany and Italy, the Boxer Expedition in 1900-1901 and the German military operations against Italy in 1915 and 1916 are cases used to pose the problem of war or peace, while the Battle of Navarino in 1827, the French actions against Annam in 1883-1884 and against China in 1883-1885 and those of Japan against China in 1931 to 1933 and again from 1937 to 1941 are offered to show the existence of battles during "peace time". The author outlines these events with rich and ample detail to place them within the focus of his thesis.

In the theoretical portion, Dr. Grob turns first to a consideration of natural law and shows adequately that "Yesterday's answers are inadequate for today's problems. Under economic, social and political conditions which change in the course of time and vary from nation to nation, there could be no appeal to reason and hence no authority in static and uniform rules of law. No body of legal rules is destined to be valid forever, or to be valid everywhere." Grob then elaborates upon the thesis in the light of this fundamental view and the historical material previously adduced. He concludes that ". . . what has to be looked for is not one over-all legal definition of war, but a variety of legal definitions, each made in the light of and in relation to the particular intent and purpose of the rule which happens to be under consideration." Each set of facts must be related not to one arbitrary definition of war, but to some one or more of the rules of war under which the event may be variously examined as in one sense peace and in another

sense war at the same time. This may sound ridiculous logically and rationally, but such is the fact in practice and such must be our realization of actuality. "In the final analysis it comes down to this: names do not change the legal nature of operations . . . they remain what they are regardless of their name and regardless of whether they are named at all. . . . Actions, as the Romans said, must be judged *non ex nomine sed ex re*."

This work is a fine exercise in legal realism and leaves one with much food for speculation over such a new term—not discussed here—as "cold war". Is it peace or is it war? Relatively speaking where are we from day to day?

LESTER E. DENONN

New York, New York

AN INTRODUCTION TO CRIMINALISTICS. By C. E. O'Hara and J. W. Osterburg. New York: The Macmillan Company, New York. 1949. \$10.00. Pages xxii, 705.

An Introduction to Criminalistics is a compilation of techniques and information gathered from the extensive literature embraced in the field of scientific crime detection. Very little original material is to be found and the lack of brief surveys of firearm identification, document examination, and lie detection, work horse departments in any police laboratory, may detract a little from the value of the text as reference material. In defense of the authors it must be said that their omission is intended since good books are already available in these fields. However, less discussion of little used and extremely expensive instruments might have left room for some treatment of more important phases such as the handling of arson investigations.

Since the group using this book will possess a varied background of education, it was written with a minimum of extraneous mathematics and formulae. Subject matter ranges from crime scene investigations to

laboratory analyses to the latest of instruments, the electron microscope. The names of leading authorities in the field of scientific crime detection appear in the acknowledgments.

The text is divided into sections and chapters; the first section deals with the laboratory in general; the second, with physical measurements in which the treatment of data will offer helpful knowledge. The third section encompasses the subject of impressions of various sorts, including fingerprints, footprints, tool marks, and describes the methods for their preservation. Photography, both at the scene and in the laboratory, is dealt with in the fourth section.

The examinations of material by physical means, such as ultraviolet, infrared and x-rays, and the procedures for handling automobile accident investigations are discussed in section five.

Some of the more important aspects of chemical examinations will be found in section six. Here, the subjects of blood, chemical tests for intoxication, seminal stains, narcotics and others are related.

Document examination, as it pertains to inks, erasures, charred documents is handled in section seven. Since there are in existence good texts on the comparison of handwriting, the authors refrained from repetitious discussion of the subject.

Optical methods of analysis and advanced instrumental analysis are discussed in sections eight and nine. Microscopy, spectrochemical analysis, x-ray diffraction and the electron microscope are treated briefly in these sections. One of the most valuable sections for the attorney's attention is the last section dealing with the probative value of physical evidence. Probability and proof are expounded in a way illuminating even to the nonmathematically minded.

It would be facetious to expect one volume to contain all of the worthwhile material encountered in this vast field. However, the authors are to be congratulated on preparing an excellent summary of many of the problems and methods in current use

in police laboratories. It is certain that there are few attorneys who can read O'Hara and Osterburg without deriving some benefit.

JOSEPH D. NICOL

Scientific Crime Detection Laboratory
Chicago, Illinois

BURKE'S POLITICS. Edited by Ross J. S. Hoffman and Paul Levack. New York: Alfred A. Knopf. 1949. \$4.75. Pages xxxvii, 536, x.

OUR EMINENT FRIEND EDMUND BURKE. By Thomas W. Copeland. New Haven: Yale University Press. 1949. \$4.00. Pages ix, 251.

It would appear from the publication of these two excellent volumes that a minor revival of the influence and reputation of "the illustrious Mr. Burke" is presently in motion. In one sense, to be sure, this is not strictly true; Burke the orator, Burke the friend of embattled America, Burke the arch-foe of the French Revolution needs no revival. His writings may not be "current and choice", but he is surely one of the more familiar of those literary, political, and scientific Englishmen with whom most literate Americans make an acquaintance in the course of their education. In another sense, however, Burke is being increasingly sought out by thoughtful persons of this generation—in this instance as political philosopher, and as conservative.

There can no longer be any doubt that more and more Americans, especially artists and writers and other intellectuals with nothing tangible to lose (votes, for instance), are turning to the principles of conscious conservatism as the most agreeable palliative, if not panacea, for our present woes. They have not necessarily rejected democracy, but they have certainly turned their backs on progressivism and reform, and have sought peace and order in the more stable and societal aspects of the western tradition. One of the accepted techniques through which a writer announces his discovery of conservatism is apparently the book

or essay about some troubled period in the past (1787 in America, 1789 in France, 1814-1815 or 1848 in all Europe) in which a prominent conservative figure is depicted as the man to whom the people should have listened more carefully. The most obvious example of this literary device is Peter Viereck's *Conservatism Revisited*, and if he can build his case for conservatism on Prince Metternich, surely other men have a right to invoke the noblest of all conservatives, Edmund Burke.

Professors Hoffman and Levack of Fordham University are primarily concerned with Burke as a conservative. Their stout volume is a carefully selected, tastefully organized, extremely useful compendium of Burke's most celebrated and serviceable writings, to which they have added an introduction on "Burke's Philosophy of Politics" and a running commentary that should leave no doubt in the reader's mind of their long-range political sympathies. For them Burke is most rightly to be remembered and his words reread as the uncompromising foe of the forces of "evil" let loose by the French Revolution (for which, not altogether incidentally, they have not the tiniest particle of sympathy). At the same time, they also give a balanced portrait of Burke's great actions and arguments for conservative reform. Nevertheless, it is the horrified and essentially blind author of *Reflections on the Revolution in France* rather than the balanced expositor of *Thoughts on the Cause of the Present Discontents* who comes through most clearly in these pages. And that is really quite unfortunate, for if Burke is to be revived as a man with a message for our times, let us hope that it will be for his brilliant, often quite flexible, defense of the prescriptive Constitution and not for his unreasoning defense of one of the most rotten regimes in modern history. It is conservatism not reaction that brings peace and stability.

Professor Copeland of Chicago is interested in Burke as a man, especially the man of mystery who went

(Continued on page 320)

1949 Ross Prize Essay:

The Proper Place of the Lawyer in Society

by Ernest Wilkerson • of the Wyoming Bar (Casper)

■ This is the essay that won first place in the 1949 competition conducted by the American Bar Association under the terms of the will of the late Judge Erskine M. Ross of California. The Association Committee that made the award was composed of John Kirkland Clark of New York, Alfred P. Murrah of Oklahoma, and Leo Brewer of Texas.

■ Nearly one hundred years ago, an Englishman determined to write a book. He wanted to set down lucidly and compellingly the principles that guided his life, and to dispel, as well as one man could, the half truths and the prejudices that he felt impeded a tolerant understanding of his beliefs. He undertook the task prayerfully, and wrote with the clarity and discernment that are achieved only by those who are determined to assemble words in a manner that will reach the hearts of men. He wrote with an inner compulsion to say what he believed to be true and what he believed needed to be said. The result was a message which, in its realm, is a masterpiece. The man was John Henry, Cardinal Newman; the book, *Apologia Pro Vita Sua*. Anyone who reads the work and lays aside his preconceptions of dogma and dialectics acknowledges the genuineness and worth of Newman's effort. The significant thing is not whether one adheres to Newman's creed; what is significant is that here was a man who had a deep-rooted belief in the meaning of his life and works and could explain it in comprehensible terms to his fellow men.

Newman, it happens, was a practitioner of religion. He could equally well have been a practitioner of medicine, of farming or of law. In every profession, in every craft and in even the most humble pursuits, there are men who believe in what they are doing and believe that what they are doing is important. A very few try to tell why; the majority do not. The latter may have the better of it. The few who are given to analysis of their place in the societal framework will feel inevitably the hopelessness that comes from trying to evaluate their work and daily activities in terms of the somewhat nebulous ideals that motivate them. It is disturbing to try to mesh the two, because to do so we must take our eyes off the shoulders of the man ahead and stand for a moment outside the line of march, trying to view the entire parade as one integrated, meaningful display. Being only men, we never do this with complete success.

Lawyer's Skill Finds Guides for Action and Conduct

A lawyer who is bent on writing about his place and function in society steers a perilous course. He be-

gins—and midway finds that he has outlined a comprehensive and boring treatise which might appropriately be taught as "The Legal Profession—one credit hour". He begins again—and finds himself fathering a compendium of legal miscellany, setting down "How" and "What" in an edifying way, but forgetting to say "Why". Or he may struggle through a Hegelian quagmire for a few thousand words before he discovers that the "Why"—the philosophy of the law—can be translated only in terms of the "How" and "What" of the lawyer's everyday routine. To strike a balance here is difficult.

It is especially important that we not take too Olympian a point of view, for the practicing lawyer, after all, is a fellow who has to sell himself and his wares to his nonlawyer neighbors in order that he and his family may enjoy a measure of the same opportunities and comforts as they. It is true that what he has to sell is different from what they have. The skill of the surgeon is essentially a mechanical one, as is that of the bricklayer. Either the incision is deep enough or it is not; the building will either stand or fall. The lawyer's skill might be said to consist in his ability to transmute certain metaphysical concepts into practical and realistic guides for action and conduct. The "reasonable man" cannot be measured with calipers; the "holder in

due course" does not come in a pattern; and "good custom and usage in the trade" cannot be weighed on the scales.

As lawyers, we deal with intangibles which we must make sensible to ourselves and to our clients through the highly imperfect medium of words. It is in this regard that the lawyer finds himself in sympathy with the minister. Both are trying to interpret and instill rules of conduct: rules which derive, in the one case, from the deliberation and councils of men, and in the other, from sources outside ourselves. The lawyer has a slightly firmer grip on reality here, for he can predict with somewhat more certitude what rewards or punishments will follow a given course of action. Consequently, he may not be so susceptible to soul-searching doubts as to whether or not he is right. Be that as it may, it is not only ministers who should feel called upon to give an occasional accounting; lawyers, being members of perhaps one of the most maligned professions, should feel a particular impulse to reason out their place and function in society.

Lawyers' Place in Society Should Be Analyzed

There is something rather wholesome in occasional introspective probings to see what makes us what we are and whether what we are is what we should be. Improvement is often born of inquiry. True, in so analyzing ourselves, we may fall gracelessly between two stools. We all know our professional Jeremiahs whose discourses intone our *mea culpas* and who assure us that in the brighter world to come there will be no place for the higgling, niggling likes of us, and we are not completely unfamiliar with those at the other extreme whose mothers presumably were frightened by the Coué formula. Most of us would acknowledge that somewhere between the two poles there lies a true analysis of what it is we lawyers have to offer to humanity that makes us worth our keep. What is it? What do we do? We do not heal the sick or build the buildings;

we do not shoe the horses or pilot the planes; we do not ride the high wires or compose the songs. What do we do? Well, for one thing—

We distinguish the cases.

Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks? *Hamlet*, Act V, Scene I

Daily we lawyers are forced, often without our being conscious of it, to make nice analyses of fact situations and to compare them with this or that legal pattern. We deal with a mechanism, the law, which is not unlike the child's toy that has a number of dissimilar apertures which will receive from the grubby hands of our little ones only blocks of the same shape and dimension, and which we bring home with the belief that it may teach perception of the like and unlike to the child. We hope that eventually he may learn that a circular hole will not receive a square block. So it is with us, when we try to find the aperture to fit the problem which concerns us.

A popular song of a few years back assured us that "Everything's Been Done Before," but we begin to wonder in the law, particularly as we try to find what the law is in the case at hand. Often as our research progresses, we discover that the cases that made the law what it is are somehow different from our own. So we distinguish the cases and so we strike out to make the law of our case what we think it should be. This seems a prosaic enough exercise, and one which possibly does not deserve mention among all of the splendid and inspirational aspects of the profession. On closer analysis, though, there seems to be a significant principle behind "distinguishing the cases" which we, as lawyers, should recognize and should carry forward for the benefit of our people and our society. Today one of the most dangerous of tendencies is the failure critically to analyze and to differentiate between things which may look, sound, and seem like other things, but which are really very different. It may be that only as

we preserve our ability to distinguish and to perceive differences and similarities can we hope to exist and mature as a civilized people.

There Is No Panacea for the World's Ills

In this time there is constant danger that we, who have the democratic right to do so, shall not weigh and assay truly the genuine and the meretricious as it pours in on us from all sides. Through our phenomenal advances in science and communication, we have taken the problems of the whole world out of the chancellery and the G.H.Q. and pitched them into the front parlor and the corner drugstore. To have done so is a magnificent accomplishment, but one that is fraught with the inquiry, "Do we as a free people have the understanding and the insight to make the right decisions if we are given the truth?" Do we have the ability to "distinguish the cases"? Only as we do will we know why foreign "isms" of whatever kind are not the answer for our people. Only as we do will we know that out of the history and characteristics of every people is woven the pattern for their existence and survival. Only as we do will we understand that because there are no cases "on all fours" in the realm of the struggle and achievements of whole peoples, there is no blanket panacea for their ills, no universal Baedeker for their economic, political and spiritual wanderings.

We lawyers know that even in the elemental realm of the relationship of one individual to another or of one individual to his state, we never find the ready-made answer. We know that, in the infinite variety of human relationships through the centuries, there have never been two instances where the identical factors produced the identical results for the identical reasons. This is why we distinguish the cases, and this is why we know that it is important to do so. We should say to our lay friends, "Criticize us if you will for our quibbling and picayune ways, but never forget that it is only as we Americans differentiate the good and bad, false

and true, Christ and anti-Christ that we may hope to escape the terror of barbaric despotism." This needs to be pointed out early, often, and with emphasis. Maybe the lawyers, because they believe it and practice it, should be the ones to be sure that it is. And this may well be one of the reasons why—

We go into politics.

The profession of law is the only aristocratic element which can be amalgamated without violence into the natural elements of democracy and which can be advantageously and permanently combined with them. De Tocqueville, *Democracy in America*, Volume I, Chapter XVI

It is no accident that lawyers have been foremen in the construction of the great backdrop of government before which has been played the drama of our democracy. The inherent premise of a free society is that man has the innate ability and integrity to judge public problems in their true light and to come to wise and timely decisions. This premise is fundamental in the operation of our legal system as well.

One of the aspects of our jurisprudence which has been subjected to the most severe academic criticism is our adversary system of procedure. Would it not be better, some say, if there were a calm and dispassionate appraisal by disinterested persons, followed by a decision rendered in an aura of sweet reasonableness, rather than a hammer-and-tong battle between special pleaders, given to excess in statement and overeagerness in forwarding their viewpoints? It is these observers (who deplore the pugnacious processes of the law) who are most surprised to see adversary attorneys "have at each other" for an hour and then link arms and walk away together. It is in that very phenomenon that there lies a meaningful kernel of significance, not only for lawyers, but for all of our people.

Processes of Law Parallel Processes of Government

This nation is not a homogeneous mass of faceless people; it is a surging, colorful pattern of individuals,

each of whom has the innate and basic human dignity recognized by our Constitution and not one of whom may be scorned, oppressed, imprisoned or punished without the awareness and appraisal of the whole of the people. Having, thus, a nation of strong men and women who are led by stronger leaders, we do not lack for divergence of interests or opinions.

Today the men of labor, the farmers, the industrialists have equally influential and capable spokesmen. These spokesmen forward, with telling advocacy, the special interests of their supporters for the consideration of the whole people, who, in a democracy, are the final court of appeal. There is apparent, thus, a close and interesting parallel between the processes of the law and the processes of government. The analogy, oversimplified, might be stated thus: in both realms, from a free interplay of excesses and biased viewpoints, we attempt to construct a fair, balanced and equitable solution. There are probably better ways of arriving at truth, but until we are blessed with a revelation as to what they are, we shall have to continue to hammer out with our imperfect and brittle tools codes of conduct and ethics which we deem wise and just. We do not, as yet, receive predictable divine guidance in our activities in this regard, so we have to do the best we, as human beings, can do.

Thus are our society and the law carried on, and thus do we try to attain in both that precarious balance which we define as the greatest good for the greatest number. It is probably because lawyers are weaned, so to speak, on the principles that every man is entitled to his day in court, that every man should be heard, that there are two sides to any question, and that equally honest, wise, and God-fearing men can hold diametrically opposed views on any given matter, that they find themselves so inevitably drawn from the practice of law into the larger arena of the practice of political science.

Simply stated, the goal of both



Ernest Wilkerson, the winner of the 1949 Ross Essay Prize, is a 29-year-old lawyer from Casper, Wyoming. A graduate of Yale Law School, he was admitted to the Wyoming Bar in 1948. During the war, he served as an officer in the United States Marine Corps.

mechanisms, the law and the government, should be to compound, out of the facts truthfully stated and a comprehension of man's essential possibilities and limitations, a solution that is fair and workable. The lawyer, trained in the gentle and difficult art of compromise and negotiation, finds himself no stranger to the same processes as they are found in government. The lawyer, who pins his faith on twelve "good men and true" to reach the right answer in his case, will most likely be one to resist those who challenge the ability of these twelve men to think for themselves in society. The lawyer who knows the intensity of effort required to prepare and plead his client's case can comprehend the sincerity of those whose views differ from his own. The law mirrors on its small surface the whole intricate pattern of the political system, and thus does the lawyer, initiated into the delicate mysteries of human action, reaction and interaction in his own profession, gravitate naturally into the larger game of politics.

We regard the equities.

Mastering the lawless science of our law,

That codeless myriad of precedent,
That wilderness of single instances.

Tennyson, *Aylmer's Field*

There is an elemental concept which underlies the Anglo-Saxon approach to the law—fairness. What is the *fair* decision between two contesting parties or between groups of millions of citizens with disparate interests? It was this need for fairness which impelled us to introduce the great concept of equity into our legal system. We thereby induced a flexibility and humanity which immeasurably strengthened the system.

Inflexibility Endangers Fairness in Law

In all of society, we have a continuing need for the same sort of tolerant understanding of the wants and needs of various of our peoples. The dangers to our form of government do not arise out of the creation of a responsible state which will and can adapt itself with fluidity to changing social patterns and human needs. The dangers lie rather in the creation of an unbending and steel-jacketed series of concepts which are used with fine impartiality to thwart the just and the unjust and to block the needed change along with crack-pot scheme.

The great architects of our democratic structure have had the same qualities as the great lawyers and judges of our legal system. Both have realized that laws and political mechanisms spring from the minds of men and that neither must be so deified as to become an instrument of oppression for one or for one million of our people. In the history of the human race, when a political philosophy or a legal system has been allowed to atrophy to the point where fairness, which is another way of saying equity, is not its basic end, then the people have thrown it off, and through turmoil and bloodshed have brought forth another system which they believed fair.

We lawyers, nurtured as we are in the importance of precedent, must, of course, give respectful and mature consideration to what has been said by other men in other times. We

must find there, if we can, the decision in our case, in order that we may serve the end of predictability in the law, but we must—and here we shall surely play false to ourselves and those we speak for if we do not—have the courage and the innate and indestructible faith in ourselves to discard these precepts, these precedents, if they are outworn, and ourselves blaze a new trail if need be to assure that fairness will lie at the end of our labors. If we do this in our profession for our clients, can we do less as citizens when we detect an oppressive and unjust economic or political situation?

Counterpart of Equity in Law Is Equity in Society

We in America are engaged in a great continuing defiance of history. All the manifold chapters of man's courageous effort to mold and direct his political and economic destiny have closed with a sorry postlude of despotism, disillusion and despair. It has ever been the lot of man to create governmental machines that, though nobly conceived, eventually toppled because of their inflexible and immutable processes which failed to change as human wants and needs changed. When this has happened, a Khan, a Caesar, a Bonaparte or a Hitler has always been ready to lay the scourge of dictatorial oppression on the individual citizen because he had failed to keep his government fair and free.

Is it not particularly necessary that we have men and women in our state and society in whom the concept of "looking at the equities" is ingrained? It was by looking at the equities that we lawyers tempered the rigidity and the harshness of the common law centuries ago, and thereby saved it from certain destruction at the hands of the people who created it but who could no longer be sure of being treated fairly under it. Oppression in law is merely a small counterpart of oppression in society. Equity in law should and must find its greater counterpart in equity in society. Lawyers, who know best the vital

and irreplaceable part equity plays in law, must be sure that so long as they can be heard, equity will have its place in our government and in the thinking of our people.

But mainly we practice law.

The popular attitude toward the legal profession, never particularly favorable, has recently grown even more cynical. The general futility of litigation has given rise to the view that the principal benefit derived from a law suit is that the controversy is ended, rather than that justice is done. . . . Despite this, there is a public respect for the mental versatility and ability of the bar. Its genius for getting results, and its peculiar facility for tackling and untangling complex situations are almost summed up in the popular assumption that a lawyer can do anything, although the process is expensive.

A. A. Berle, Jr., writing in *Encyclopedia of Social Sciences*, Vol. IX, page 344, "Legal Profession and Legal Education".

Not too long ago there was a uniformity of interest and activity among our lawyers. In the days when the gangling Abe Lincoln rode circuit, the lawyer of New York would have felt at home in North Carolina, and a young aspirant "reading law" in Maine could, with equal ease, have packed his bindle to Massachusetts or Missouri. In retrospect, there seems a pleasant simplicity about those days. The unqualified edicts of Blackstone make our present writers seem a lot of namby-pambies, and the fervor and colorful phraseology that our predecessors used in "pleading their cases" make our current courtroom work drab by comparison.

Practice of Law Has Changed

Tastes, of course, have changed. Today we are motivated by inquiry and skepticism. None of our judges or writers is safe from the "legal realists", and as for "pleading the case", we are all so wary of appearing unsophisticated that we hesitate to invoke the fiery phrase and purple passage (which may be all to the good.)

(Continued on page 347)

Melville Weston Fuller:

"The Chief" and the Giants on the Court

by Willard L. King • of the Illinois Bar (Chicago)

■ This is another chapter from Mr. King's biography of Chief Justice Fuller, soon to be published by The Macmillan Company. In it, he describes the men who made up the bench of the United States Supreme Court in 1888 when Fuller was appointed Chief Justice. It was a strong court, composed of forceful, able men, and the new Chief Justice found it no easy task to command their respect and keep their differences within the bounds of propriety. The story of how he succeeded makes a fascinating footnote to American history.

■ "Oh, but there were Giants on the Court in those days," Fuller sometimes said in his later years. He referred first of all to Samuel F. Miller and Stephen J. Field who, in accordance with their seniority, sat on his right and left. They were the last survivors of the appointees of President Lincoln.

Miller had originally studied medicine in Kentucky and practiced there as a physician. Then he had taken up law and, because he detested slavery, had moved to Iowa. Like Lincoln, he was a typical American country lawyer. Such a man by long experience in thinking out his own problems without preconceptions often surpasses the more sophisticated city lawyer. The law reserves its richest prizes for the inductive mentality rather than the deductive—for the man who formulates his own major premises from his experience rather than remembers them from books. Miller illustrated Justice Holmes' famous dictum that "The life of the law has not been logic: it has been experience."

He was a big man—blunt as a hippopotamus and candid as sunlight; even his rival, Field, admired his "backbone". Miller had been on the Court twenty-six years when Fuller became Chief Justice and had written more than his share of important constitutional opinions; he was sometimes referred to as the greatest figure in constitutional law since Marshall. His colleague, the Boston intellectual, Justice Horace Gray, said of him: "In a rough and tumble frontier community Miller was a type to gain advancement—but if he had had a legal education, he would have been second only to Marshall." Chief Justice Chase had declared that Miller was beyond question "the dominant personality" on the Court.¹

Fuller set out to win Miller's good will—no easy task for a well-to-do

city man and a Democrat. "It is from some western prairie town," Miller had asserted, "rather than some metropolis that future Marshalls . . . shall arise."² And he, himself, died poor. Furthermore, he had been disappointed when his strong claims to the Chief Justiceship had been ignored at the time Chief Justice Waite was appointed. And he had also been mentioned for the place prior to Fuller's appointment. But Miller never held a grudge—even Chief Justice Tancy, who was odious to all Republicans because of the Dred Scott decision, had won Miller's affection in 1863. And Fuller's powers to convert hostility into friendship were remarkable—though for more than a year he felt that he was making no progress with Justice Miller.

Fuller's efforts to get on a friendly basis with his colleagues are shown by a story that he told them soon after he came on the Court. He said that when he went to Augusta after his appointment he rode in the bus from the railroad depot to the Augusta House. The bus-driver was a boyhood acquaintance and the following colloquy took place:³

Fuller: Have the boys heard that I

1. The Gray quotation is from Samuel Williston, Justice Gray's secretary in 1888-1889, in an interview, August 3, 1945; the Chase quotation is from Strong, "Samuel Freeman Miller", *Annals of Iowa*, January, 1894, page 247. To the same effect, see the letter Miller wrote to Ballinger on July 27, 1892: "I doubt if my effective influence on the court would be increased by being made its Chief."

quoted in Fairman, *Mr. Justice Miller and the Supreme Court* 256.

2. Address by Miller in the *Albany Law Journal* (July 12, 1879).

3. Professor Williston says that this story was told to him at the time, probably by Justice Gray, as being told by Fuller. The story is part of the American folklore though it is usually not attributed

have been appointed Chief Justice?

Bus-driver: Oh yes.

Fuller: What did they say?

Bus-driver: Oh—they laughed.

Fuller's personal humility was inexhaustible and in sharp contrast to his fierce pride in the Court and his position on it.

Fuller Receives Compliment from Colleagues

His success in winning Miller's respect and affection is shown by an incident that occurred the following year. Fuller had been invited to speak before the joint session of Congress on the centennial of Washington's inaugural as President. He did his best in this address and it was well received. Shortly thereafter, Bancroft Davis, the Reporter of the Supreme Court, wrote him that, at the suggestion of Justice Miller, the Justices had decided to publish this speech in the Supreme Court reports—a most unusual compliment. Fuller replied: "Your note yesterday took me by surprise—a pleasant one . . . I am deeply gratified that the suggestion came from Mr. Justice Miller. . . . I think you will understand—No rising sun for me with these old luminaries blazing away with all their ancient fires."

But Fuller's complete capture of Miller is recorded by Senator Cullom in his memoirs: "Justice Miller told me on one occasion that Fuller was the best presiding judge that the Supreme Court had had within his time; and in addition he was a most lovable, congenial man."⁴

Another titan on the Court was Justice Stephen J. Field who, as the second member in point of seniority, sat on the Chief Justice's left. Field was one of the famous sons of a New England Congregational minister. Justice Field's brother, Cyrus Field, had laid the Atlantic cable; his brother, David Dudley Field, was the author of the New York code and a leading New York lawyer; his brother, Henry Martyn Field, (hero of the modern novel, *All This and Heaven Too*) was a prominent clergyman; and a sister's son, David J. Brewer, later became Field's col-

league on the Court.

Stephen Field, after high honors in college, a trip abroad and several years of law practice with his brother David in New York, had gone to California during the gold rush. His career there had been turbulent, involving near-duels, disbarments and reinstatements, election to the legislature where he secured the adoption of the Field codes, and finally brilliant service as a judge of the Supreme Court of California. Although, like all the Fields, he was a Democrat he had been appointed to the Supreme Court by President Lincoln in 1863. He had a keen mind and a capacity for sharp precision of statement; he was methodical and untiring in his industry; his distinction as a judge lay in his iron character, earnestness, intensity and persistent force. But he was self-confident, almost to the point of being offensive; and he was sometimes hot-tempered and vindictive.

The Difference Between Field and Miller

He differed from Justice Miller as the doctrinaire differs from the empiricist. Field's approach to any problem was likely to be in terms of fundamental principles—of natural or inalienable rights; he took his major premises from his preconceptions rather than formulated them from his experience; he sought governing principles rather than an expedient course. As Professor Swisher puts it, "He tended to over-emphasize the importance of selected principles, and to disregard too much the determining influence of the whole welter of human experience."

If such generalizations were not so dangerous, it might be suggested that this antithesis between Field and Miller marks a difference between the historical Democratic approach and the usual Republican reaction to problems. Jefferson was more doctrinaire than Hamilton—Hamilton

more empirical than Jefferson—and similar examples could be cited. But the categories of doctrinaire and empirical are as dangerous as those of liberal and conservative—such classifications lead to naïve conceptualism. Too much depends upon the vantage point. Fuller claimed to dispense doctrinaires, but his political adversaries so classified him on the issues of the protective tariff, states' rights and hard money.

When Fuller's appointment was announced in Chicago, Wirt Dexter, a prominent lawyer, referring to Field's intensity and Fuller's diminutive size, said: "Field will eat him in one bite." As the outstanding Democrat on the Court, Field had wanted the place for himself but there is no evidence that President Cleveland considered him for it. Fuller, however, quickly established cordial relations with Justice Field based upon their New England backgrounds, fundamental Democracy and deep attachment to the bill of rights.

Field Praises Fuller as Chief Justice

About a year after Fuller's accession, the centennial celebration of the organization of the federal judiciary was held in New York. The Chief Justice felicitously introduced Justice Field, a former member of the New York Bar, as the speaker for the Court. Thereafter in acknowledging a copy of this introduction and Field's address, Fuller said: "I am more pleased with your . . . [speech] than ever. I can't exactly define what the particular charm is but I think it is the ease with which a good deal of weighty thought is conveyed without fatigue to the reader." Field, as a result of his early years of code-drafting, had a succinct, compressed style which Fuller, whose style was less concise, sincerely envied.⁵

Fuller's winning of Field is indicated by a letter from the Chief Jus-

to Fuller. It may have been true—it is certainly typical Maine bus-driver—or it may have been adapted by Fuller to the occasion.

4. Address in Commemoration of the Inauguration of George Washington, delivered December 11, 1889, 132 U. S. 706. See favorable descrip-

tion of this speech in Cullom, *Fifty Years of Public Service* 240; Fuller to Bancroft Davis, January 18, 1890, Bancroft Davis papers, Library of Congress.

5. Centennial Celebration addresses in 134 U. S. 711, 728-729; Fuller to Field, February 14, 1890, Field Papers, University of California.



THE SUPREME COURT OF THE UNITED STATES IN 1888: (left to right, seated) Justice Bradley, Justice Miller, Chief Justice Fuller, Justice Field, Justice Lamar; (left to right, standing) Justice Matthews, Justice Gray, Justice Harlan and Justice Blatchford.

tice to his wife a year later. "Field told me on the bench this morning," Fuller wrote, "that in the conferences I was almost invariably right. He said I was remarkably quick in seizing the best point. He has never said as much before."⁶

The Justice Holmes of that Court was Joseph P. Bradley who sat at Miller's right. He was the son of a poor New York farmer and his early education had been in the rural schools. At the age of twenty, in 1833 (the year in which Fuller was born), Bradley had entered Rutgers College. After his graduation he had studied law in a Newark, New Jersey, law office and practiced there with high success until his appointment to the Court in 1870. He was a man of prodigious industry and breadth of learning. He had the ascetic, intellectual face of an Italian Cardinal; his avocations were mathematics, genealogy and Arabic; but the qualities that made him an outstanding judge were his mental mus-

cularity and his extreme open-mindedness. Despite his life-long record as a Whig and a Republican, the Democrats had chosen him as the best odd-man or umpire, under the circumstances, on the electoral commission in the Hayes-Tilden contest for the Presidency in 1876 and had accepted (though not without sharp complaint) his adverse decision.⁷

When Fuller was appointed, Bradley had wished to have the Chief Justice appointed from the Court; he preferred Miller or Field to an outsider and wrote Field expressing his regret that he was not appointed.

Bradley Criticizes Fuller's Speech

Fuller submitted to Bradley the draft of his address on the Washington

Centennial and carefully preserved Bradley's letter of criticism.⁸ "I must say that I think it admirable in conception and execution," Bradley wrote. "One man's style is not another's, any more than his voice. Yours is more florid, more dipt in poetical dyes than mine for example (if I have any); but I am not sure that I should not come to prefer it by greater familiarity." Who could resist so tactful a criticism? The address, which established Fuller's reputation, was not too florid, when it was delivered.

In another criticism of this address Bradley was more direct. "'Destructive giant of paper currency by government fiat,'" he wrote, "is a strong expression and might be thought to hint a rebuke to the final decision of

6. Fuller to Mrs. Fuller, January 13, 1891, Genet papers.

7. Mr. Justice Frankfurter has written me: "I rejoice over the view you have formed of Bradley. For myself I place him at the top of the heap for breadth and penetration and the qualities that endure. 'Objectivity' was indeed his quality to a very rare degree for here was the corporation

lawyer 'par excellence' and yet he did things like his dissent in the Minnesota Rate case in 134 U. S. which if it had been the Court's opinion would have saved the country much friction and folly and the Court a sad chapter in its history—all the 'reproduction' story and the rest."

8. Bradley to Fuller, December 5, 1889, Genet papers.

the court on that subject—though I am sure not so intended." This last was a polite judicial fiction. The final decision of the Court on this subject was *Juilliard v. Greenman*⁹ which Fuller's relative, Dr. George Bancroft, had railed against in his "Plea for the Constitution of the United States Wounded in the House of its Guardians." This was the case which Fuller had criticized in his presidential address before the Illinois State Bar Association in the year preceding his appointment. Bradley was one of the judges who was said to have been put on the Court by President Grant to reverse the first legal tender decision,¹⁰ but this charge was unjust to Bradley in the light of the evidence since produced. However the decision was reversed¹¹ as a result of the appointment of Justices Bradley and Strong so Bradley's sensitivity on this subject is understandable. On his suggestion Fuller struck out the objectionable words, but his speech still indicated that the public credit (which Washington commended to be cherished) had been saved by the abandonment by Congress of paper currency.

Fuller and Bradley Become Close Friends

Fuller won Bradley by asking his aid on this address much as Benjamin Franklin reported that he gained a man's good will by borrowing a book from him. The spirit of helpfulness is strong and easily aroused in intellectual people. Bradley took the new Chief Justice under his care and constantly counseled him. Fuller was closer to Bradley than to any other Justice during the three years of their joint service.

Bradley's opposite number on the left of the Chief Justice and Justice Field was John Marshall Harlan of Kentucky. Born in 1833, the same year as Fuller, he had been a member of the Supreme Court for eleven years when Fuller was appointed and he was to serve until one year after his death. Originally a Whig, Harlan had not supported Lincoln for President in either 1860 or 1864 but he was a colonel of a Kentucky regiment

in active service on the Union side during the war. He was elected Attorney General of Kentucky in 1863 on the Union ticket but after the war he at first opposed and later supported the Thirteenth Amendment and became a stalwart Republican. He was twice an unsuccessful candidate for Governor of Kentucky, and was appointed to the Court by President Hayes in 1877 after honorable service as a member of the President's Louisiana Commission to determine the claims of the rival governments there.

He was a tall, aggressive, courageous man who made up his own mind regardless of the opinions of others. His dissents were frequent and vehement. Next to his religion he revered the Constitution but he believed that it should be interpreted by common sense as a layman would read it. He was averse to the subtle refinements on which many legal questions ultimately turn. This attitude did not always gain for him the respect of his colleagues. Thus Holmes wrote to Pollock that Harlan's mind was "a powerful vise the jaws of which couldn't be got nearer than two inches to each other." Holmes said that Harlan "although a man of real power, did not shine either in analysis or generalization."¹²

Harlan loved political maneuvering. Justice Miller once wrote that Harlan had "secured more favors at the hands of the President than any man I know." Although Fuller had opposed Harlan's confirmation, they had become great friends by the time of Fuller's appointment. Fuller had argued many cases before Harlan on circuit and Harlan's son, James, was a law student in Fuller's office. Before his appointment, the Fullers frequently stayed at the Harlan home when they went to Washington. Harlan took charge of the

efforts to secure Fuller's confirmation. When he was confirmed, James Harlan accompanied him to Washington and became his secretary, but he returned to Chicago in a few weeks on the organization of the law firm of Gregory, Booth & Harlan which took over Fuller's practice in Chicago. Fuller made his headquarters in the office of this firm during his summer visits to Chicago.¹³

Address Establishes Reputation of New Chief Justice

On the occasion of Fuller's Washington Centennial address, Justice Harlan wrote Mrs. Fuller: "After the crowd dispersed today, I happened to meet quite a number of Senators and Representatives. The commendation of the Chief Justice's name was general and hearty. The address has fixed the position of the Chief Justice before the country and will add greatly to the power and prestige of the court in the popular mind." Fuller and Harlan remained close friends for the rest of their lives although they frequently disagreed in their opinions.¹⁴

The next seat on the Court was vacant when Fuller took the oath due to the illness of Justice Stanley Matthews. He never returned to the Court and died a few months later.

Perhaps the greatest legal scholar on the Court was Justice Horace Gray. He came from a distinguished Massachusetts family; his half-brother was John Chipman Gray, the Harvard Law School professor and Boston lawyer, whose reputation still stands preëminent as the authority on the law of real property.

Horace Gray had graduated from Harvard College at sixteen; had been appointed Reporter of the Supreme Court of Massachusetts at twenty-six and a Justice of the Court at thirty-six. Nine years later he became

(Continued on page 349)

9. 110 U. S. 421 (1884).

10. *Hepburn v. Griswold*, 8 Wall. 603 (U. S. 1870).

11. *Knox v. Lee*, 12 Wall. 457 (U. S. 1871).

12. 2 *Holmes-Pollock Letters* 7-8.

13. Fairman, *Mr. Justice Miller and the Supreme Court* 370, quoting a letter of December 25, 1880; on Harlan's political activities; see also Butler, *A Century at the Bar of the Supreme Court* 71, 172;

Williston, *Life and Law, An Autobiography* 96-97; record of appointment of James Harlan as Fuller's secretary, dated October 8, 1888, 21 *Chicago Legal News* 41.

14. Letter quoted from Harlan to Mrs. Fuller, December 11, 1889, Genet papers. There are more than a hundred letters from Harlan to Fuller in the Genet papers and two letters from Fuller to Harlan in the Harlan papers at the University of Louisville.

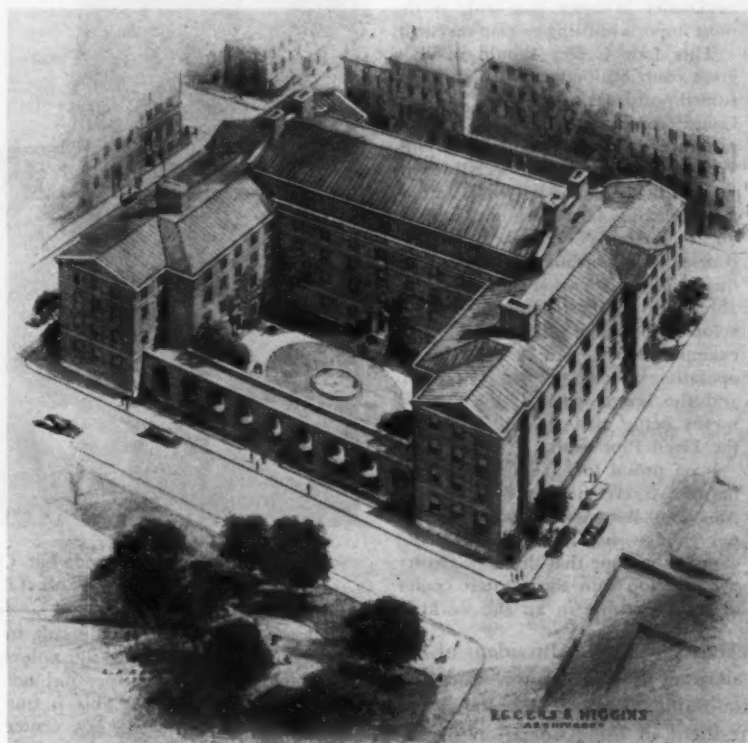
New York University's Law Center: Cornerstone Laid at Impressive Ceremony

■ The cornerstone of New York University's new three million dollar Law Center which will rise on a square block site located on Washington Square South in New York City, was formally laid on Tuesday afternoon, January 31, 1950.

The afternoon cornerstone ceremonies were followed in the evening by the 62d annual dinner of the University's Law Alumni Association, at the Waldorf-Astoria Hotel, which was held in special celebration of the significant event. At the dinner Dr. Harry Woodburn Chase, Chancellor of the University, announced to the 1500 law alumni present, that the University Council had resolved to name the new building "Arthur T. Vanderbilt Hall" in honor of the Law Center's founder and foremost exponent. The Law Center project was first proposed by Chief Justice Arthur T. Vanderbilt of New Jersey when he was Dean of the New York University Law School in 1915.

The resolution commemorating the signal honor for Chief Justice Vanderbilt stressed his resourceful and energetic leadership which inspired the alumni and friends of the University to contribute the necessary funds to make possible the construction of a permanent home for the Law Center. It also paid tribute to Chief Justice Vanderbilt as a lawyer, teacher, dean, civic leader and exponent of procedural law reform and to his contribution to legal education and to judicial administration.

Representatives of the country's legislators, law faculties, the Bench and the Bar attended the cornerstone laying ceremonies at three o'clock in the afternoon. Justice Vanderbilt set the stone in the presence of Robert



Architect's Drawing of the New York University Law Center

P. Patterson, former Secretary of War, Dr. Chase, other University officials and honored guests. He also supervised the depositing of a sealed copper box containing records, mementoes and publications of the New York University's Law Center in a simple granite block inscribed with the numerals "1950".

President Gallagher's Address

Edward J. Dimock, member of the Board of Governors of the American Bar Association for the Circuit embracing New York, read an address prepared by Harold J. Gallagher, President of the Association, who was detained from being present by

inclement weather at Detroit. It was as follows:

One of the most important matters, I believe, facing our profession today is to strengthen greatly the organization of the entire profession. History shows that our profession has performed its greatest public service when there has been an all-inclusive organization of the Bar with control over education, professional training and admission to practice and with authority over and responsibility for the conduct of its members. A Law Center such as this can play a vitally important part in local, state and national bar association work. This Law Center will have resident experts in all fields available for consultation, will have graduate students at work on research projects in collaboration with bar

association committees. I hope that our American Bar Association and all state and local associations will be able to cooperate very closely in this important work of the Law Center. We should contribute all we can to the development of your work and the furtherance of your objectives and, in turn, we will look to you for like cooperation and assistance in the all-important goal to improve the administration of justice—justice which, as Daniel Webster has said, is the most important thing to man on earth.

This Law Center should make a great contribution in aiding the continued post-legal education of the Bar. Competency in the Bar is of first importance in good public relations. With the great many specialities in various fields of the law, it is important that busy lawyers should have an opportunity to take refresher courses in important subjects, at frequent intervals, so that they may keep abreast of the ever-changing and developing branches of the law. A fine example of what can be done by cooperation between the bar associations and the law teachers is the current survey being made by the Survey of the Legal Profession.

I am proud to have a part in this impressive ceremony. In behalf of the American Bar Association, I extend our good wishes for the future, and express the hope that this Law Center will develop into the greatest center of legal learning in all the world.

Harrison Tweed, President of the American Law Institute, and the Honorable Robert P. Patterson, President of the Association of the Bar of the City of New York, spoke informally. Russell D. Niles, Dean of the Law School, presided.

Mr. Tweed directed his remarks principally to the role that the Law Center could play in the process of law reform. He said:

There are all kinds of different methods of law reform and in every one of them an institute or a law center plays an important part. The ordinary procedure, of course, is in the regular day-by-day process of the trial of cases and the appeals and decisions in the higher courts. That is the slowest form but it would be even slower if there were no schools where lawyers could learn to be lawyers and go to places where they could prepare their arguments which are necessary to make the changes in the law appropriate to the changes in conditions. . . . It is easy to find



Willis Art Photo

Chief Justice Arthur T. Vanderbilt, Chancellor Harry Woodburn Chase and Robert P. Patterson.

what the law is but it is difficult to find those facts indicating the points at which the legal structure did not fit current needs. . . . This is one sort of research which a law center can conduct and this city, which is the focus of finance and trade, is certainly the place to do it. . . . This Law Center will be something more than an aid, it will be an inspiration to the continuance of reform without which the law cannot serve its purpose to bring order and happiness nationally and internationally.

Judge Patterson who followed Mr. Tweed as a speaker at the ceremonies, remarked:

. . . in this complex society of ours we have problem after problem come up and piecemeal remedy is given, and then the welter of boards, commissions, authorities, bureaus, etc., and with that we have a condition where the very solvency of the government and the order of self-government where the people rule is at stake. I see in that condition a vast opportunity for this Law Center, a vast opportunity to do two things, aid in the

program of the relief that is needed and secondly, and equally important, in the expounding or development of that program, later, to the elucidation of our people.

. . . I submit that to New York University and to Arthur Vanderbilt, the legal profession and the nation as a whole, already owe a great debt, and I make the confident prediction that the time will come when this building and the date, 1950, on the cornerstone will be recorded as marking a strong step forward in enlightened self-government.

Remarks of Chief Justice Vanderbilt

Chief Justice Vanderbilt, who was the principal speaker at the dinner, said that the Law Center, by putting the work of experts at the call of the profession and the public could help to simplify public and private law, obtain more efficient enforcement of the criminal law and eliminate the good causes for public complaint about the administration of justice. Thus, he declared, it could help to

manufacture more respect for law on which government in a democracy inevitably depends.

He concluded his address by stating that "we have the most complicated set of forms and system of judicial administration in the world. The myriad legal problems which arise as a result of the complexity of this system should be receiving the attention of the faculty of our graduate students and of the experts from the workaday world, be they legislators or administrators."

Justice Vanderbilt explained the function and purpose of the Law Center in modern society as he envisioned it in the following manner:

Briefly what I picture, first of all is a small undergraduate school of 500 or 600 fulltime students carefully selected from all over the country on the basis not only of their academic attainments but of their potentialities for future public leadership judged by their college and high school records. I envision an evening school of about 300 similarly chosen and having every privilege accorded to the full-time students. I have in mind an undergraduate school in which from the outset the students will be concerned not only with the principles of the law and the reasoning back of those principles but with the know-how of putting the principles to work. The law schools of the country cannot continue to lag behind the engineering and scientific schools with their laboratory work or the medical colleges with their clinics. It is not right that young lawyers should learn the skills required in the profession at the expense of their clients. We must, moreover, annul the divorce between public law and private law that occurred when the casebook method was introduced in the law schools three-quarters of a century ago. In this age of big government, when one citizen out of every eight is on the public payroll, we must accord the public law its proper place in the curriculum. Our students must be as well trained in the handling of statutes, administrative regulations and ordinances as they are in dealing with the decided cases. If their law school work discloses any vital academic defects, these deficiencies must be supplied before they graduate.

Next comes the graduate school with the widest variety of courses and with students not only from this country but from abroad. The Inter-American Law Institute and the Food

Law Institute, are but forerunners of others equally necessary. Our publications program and our schedule of annual conferences will continue and will be expanded. All are essential in the diffusion of knowledge of the living law.

It is to the Law Center proper, however, that we must turn for the preservation of the law itself. The 5,000 reported decisions of Coke and Bacon's time and the 10,000 decisions of the period of Mansfield, Blackstone and the American Revolution have grown to 2,000,000 in our day. If our law is to survive, the keynote of our efforts must be simplification. I have in mind, however, no grandiose program. I am interested only in specific problems and concrete results. Consider the administration of justice in the United States today. Do our people complain of the substantive principles of the common law? Not at all. They complain, and with good cause in many jurisdictions, of the law's delays, of the technicalities of procedure, and of the occasional want of capacity or bad manners of a judge here and there—all matters that can readily be righted, if the experts will assemble their knowledge and place it at the disposal of the profession and the public and if the profession and the public can be persuaded to avail themselves of it.

Take the matter of respect for law on which government in a democracy inevitably depends. Of what avail to preach respect for law in the secondary schools and colleges if what the 10,000,000 or more defendants in traffic cases, many of them young people, see and hear in our local criminal courts does not inspire respect for law? What can be done in this respect by our School for Traffic Judges is demonstrated by a letter from an upstate judge, a lawyer of many years' experience, who has written us that since taking the course and applying its principles, over 80 per cent of the defendants in his court have thanked him for the justice of his decisions while the aggregate of the fines he imposed increased 50 per cent. With some serious crime of violence occurring every twenty seconds, day and night, throughout the country, according to J. Edgar Hoover, we are naturally concerned with the administration of the criminal law. We are startled to read that the National Municipal Association, a highly responsible organization of public officials, has appealed to the Federal Government to save the local municipalities from being taken over by gangsters. We know that every one of our most treasured

civil rights depends in the ultimate analysis on the enforcement of the criminal law. Shall we say we can do nothing about it or shall we summon to our aid the outstanding experts in the field? With no humor intended in skipping from crime to income taxes, why should we have the most complicated set of forms and system of administration in the world? These and a hundred other similar problems should be receiving the attention of our faculty, of our graduate students, and of experts from the workaday world be they legislators or administrators, businessmen or labor leaders. This work must be done if our law is to be made to serve the needs of the times. It cannot be done by individual judges or lawyers. It can only be accomplished by group action of the most competent experts available whose work in turn must be submitted to the scrutiny of the profession and the public. It is the effective, practical work of such groups that I envision as the heart and soul of the Law Center.

The evening's celebration was concluded with an address by the Honorable Anthony P. Savarese, Surrogate of Queens County, New York, President of the University's 8500 law alumni. Judge Savarese reported on the progress of the Law Center project during the past five years, to the law alumni and said in part:

... in 1943 Judge Vanderbilt became Dean of our Law School. That gave us the man with the idea, vision, courage, industry and great hope. The crusade for a great Law Center was launched, right in the midst of the last World War. . . . tonight the curtain rises on the final phase of this great Law Center idea. All that is now required of us is to complete the task of raising the final million dollars to complete the Law Center building mortgage free. To this task, we the law alumni pledge ourselves.

Surrogate Savarese also indicated that the present plans call for the completion of the new four and one-half story Georgian brick structure by December of 1950 and occupancy for actual use by the student and faculty bodies of the Law Center by February, 1951. He also revealed that it was planned to dedicate the Law Center building in September, 1951, when the American Bar Association will hold its Annual Meeting in New York City.

THE PRESIDENT'S PAGE



HAROLD J. GALLAGHER

The Permanent Organization of Bar Association Presidents

■ In the previous issues of the JOURNAL reference has been made to the invitation extended to the presidents and secretaries of all bar associations represented in the House of Delegates of the American Bar Association and to other bar presidents and secretaries as well to attend a meeting in Chicago on February 25 for the purpose of perfecting plans for coordinating the activities of the American Bar Association with state and local associations and to form a permanent Conference of Bar Association Presidents.

This meeting was held as scheduled. Presidents or presidents elect of thirty-five state associations and, in addition, presidents of many local bar associations, past presidents of the American Bar Association, members of the Board of Governors and State Delegates were in attendance.

As a result of the Conference, a permanent organization of bar association presidents was created to promote the objects and purposes of the respective bar associations; to provide for the mutual interchange of ideas to stimulate the work of bar associations generally and to develop a cordial relationship and spirit of unity and sympathetic understanding among all the bar associations of the nation for the benefit of the public and the profession.

The Conference is composed of the presidents of all state bar associations and of all local bar associations represented in the House of Delegates, the President of the American Bar Association, all past presidents and presidents elect of all such associations, as members; and the presidents of all other local bar associa-

tions in the United States and its territories, and past presidents thereof, as associate members. The Conference is completely independent and autonomous.

At the conclusion of the first day's session, the articles of organization were adopted and officers and members of the executive council were elected as follows: Chairman, Charles W. Pettengill, immediate past president of The State Bar Association of Connecticut; Vice Chairman, Richard P. Tinkham, president elect of The Indiana State Bar Association; members of Executive Council, Allen Crowley, president of the State Bar of Texas; Richard H. Hunt, president of the Florida State Bar Association; Albert E. Jenner, Jr., president of the Illinois State Bar Association; A. M. Mull, Jr., president of the State Bar of California; John McL. Smith, president of the Pennsylvania Bar Association, and the President of the American Bar Association as an *ex officio* member.

Under the articles of organization of the Conference two standing committees were created—(1) Committee on Coordination of Bar Activities of all the State and Local Bar Associations with the American Bar Association, (2) Committee on Bar Programs and Activities. These Committees will study the activities of all bar associations and the programs arranged or sponsored by them for their annual or other meetings and recommend appropriate standards which all bar associations should endeavor to meet in the interest of the public good and professional advancement.

I had requested the presidents of all the state bar associations to make available at the meeting material showing the activities engaged in by their associations, the publications printed and the public relations work carried on. The response to this request was magnificent and the material presented at the meeting for general distribution should prove to be very valuable in acquainting the bar associations throughout the country with the activities of their sister associations.

I called the Conference to order and made opening remarks as to the purpose of the Conference and what was to be achieved thereby. Reginald Heber Smith, the Director of the Survey of the Legal Profession, outlined the purposes of the Survey and discussed the minimum standards for the administration of justice as contained in the book recently published by Chief Justice Arthur T. Vanderbilt of New Jersey, *Minimum Standards of Judicial Administration*. Through the courtesy of Justice Vanderbilt, copies of this book were distributed to the state bar presidents in attendance at the meeting.

Robert R. Milam, Chairman of the Committee on Coordination of Bar Activities and Integration of Effort of State and Local Associations with the American Bar Association, outlined the plan of coordination which is now being undertaken and to which I shall later refer.

During the Conference the bar association presidents gave individual reports as to their own states and chairmen of committees of the American Bar Association explained the work of their committees. These were the Committees on American Citizenship, Public Relations, Legal Aid, Lawyer Reference Plan, Unauthorized Practice of the Law, and Continuing Legal Education.

Kurt F. Pantzer, of the Indianapolis Bar Association, explained the valuable work of that Association's program on Continuing Legal Education and drafting of legal documents. He made available for inspection of the group useful compilations

of documents and other material used in the program of the Indiana State Bar and the Indianapolis Bar Association.

The members of the Conference expressed themselves as being highly pleased with the program and stated that they had received much inspiration and many ideas from the meeting which they would be able to use in their own bar associations. In addition, they expressed appreciation for the opportunity to meet the other presidents who are facing similar problems.

The meeting continued on Sunday, February 26, with the newly elected Chairman of the Conference, Mr. Pettengill, presiding.

It has been arranged that at the Washington meeting of the American Bar Association next September, the Conference of Bar Association Presidents will participate with the Section of Judicial Administration and the Conference of Chief Justices in sponsoring a dinner at which the Chief Justices of the several states and, it is hoped, the Chief Justice of the United States will be in attendance.

I wish to express my personal appreciation for the fine response to my invitation to attend this Conference and for the valuable contribution that has been made by the state bar presidents to the advancement of bar activities in the nation and to wish for the Conference the greatest measure of success in its future activities. I am sure this will constitute an epoch-making event that will make it possible for the Bar of the country to unite in a single effort to achieve objectives in the interest of the public and of the profession.

Thirty-five states were represented at the Conference. Following is the list of participating bar associations and their representatives:

ARKANSAS

Bar Association of Arkansas
President—Cecil R. Warner, Fort Smith
Secretary—Gerland P. Patten, Little Rock

CALIFORNIA

The State Bar of California
President—Archibald M. Mull, Jr., Sacramento

The Los Angeles Bar Association
Senior Vice President—Herman F. Selvin, Los Angeles

COLORADO

Colorado Bar Association
President-Elect—Edward G. Knowles, Denver

CONNECTICUT

State Bar Association of Connecticut
President—Samuel H. Platcow, New Haven
Past President—Charles W. Pettengill, Greenwich

DELAWARE

Delaware State Bar Association
President—E. Ennalls Berl, Wilmington

DISTRICT OF COLUMBIA

Bar Association of the District of Columbia
President—John L. Laskey, Washington
Executive Secretary—James D. Mann, Washington
Federal Communications Bar Association
Past President—Guilford Jameson, Washington

FLORIDA

Florida State Bar Association
President—Richard H. Hunt, Miami

ILLINOIS

Illinois State Bar Association
President—Albert E. Jenner, Jr., Chicago
Past President—Amos H. Robillard, Kankakee
First Vice President—A. L. Yantis, Shelbyville
Secretary—Deneen Watson, Chicago
Executive Secretary—Charles B. Stephens, Springfield
Chicago Bar Association
First Vice President—George E. Woods, Chicago
Assistant Secretary—Joseph M. Larimer, Chicago

INDIANA

The Indiana State Bar Association
President—Telford B. Orbison, New Albany
President-Elect—Richard P. Tinkham, Hammond

IOWA

The Iowa State Bar Association
President—William F. Riley, Des Moines
Secretary—Edward H. Jones, Des Moines, and Burt J. Thompson, Forest City

KANSAS

Bar Association of the State of Kansas
G. L. Light, Liberal

KENTUCKY

The Kentucky State Bar Association

President-Elect—Marcus C. Redwine, Winchester

LOUISIANA

Louisiana State Bar Association
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Vice President—George T. Madison, Bastrop
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Baton Rouge Bar Association
President—Ben R. Miller, Baton Rouge

MARYLAND

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President—Joseph Bernstein, Baltimore

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Secretary—Adolph K. Schwartz, St. Louis

MONTANA

Montana Bar Association
President—E. A. Blenker, Columbus

NEBRASKA

Nebraska State Bar Association
President—Earl J. Moyer, Madison

NEW HAMPSHIRE

The Bar Association of the State of
(Continued on page 351)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICE

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■ A Lawyer's Fancy Lightly Turns . . . !

"Whan that Aprille with his shoures sote the droghte of Marche hath perced to the rote"—comes Spring! Not only for Chaucer's Man of Lawe but also for us more modern pilgrims who travel today along the legal highways and byways with Blackstone, Marshall and Holmes. On State Street, on Wall Street, on Main Street, America, appears a new zest in the step of the students of the calf and buckram.

Winter snows melting on hibernating hills swell bubbling brooks, bursting their banks. The devotees of Izaak Walton's pastime catch day-dream glimpses of rainbow trout, shimmering pools and flashing flies. It is the vernal efflorescence. What is so rare!

May we never leave the alluring and insistent arms of our jealous mistress, the law? When green hills beckon, is it illegal to play the truant? Must desk and chair, pad and pen, be our life sentence? Is the law just books and logic, rules and briefs and endless conflict? *Non est!* With Mr. Bumble we say, "If the law supposes that, the law is a ass, a idiot!"

"The life of the law has not been logic," said one who each year noted the first time he heard the croak of a bullfrog, the first time he saw a crocus; one who at 91 observed that "the cherry trees around the Potomac basin have been as beautiful as ever". The life of the law lies in the experiences, in the lives of men; men with their hopes and fears, their ambitions, their successes and their failures in their little wars. So—live with men; fish with them; tramp with them and learn of men's and

nature's laws. Heed the invitation of this new Spring. Drink deep the beauties of life's recurrent renaissance! Hail Spring!

■ The Conference of Bar Association Presidents

February 25, 1950, marked the beginning of an era in the history of the organized Bar in the United States of America. On that day the highest officers of thirty-five of the state bar associations and twelve of the local bar associations met in Chicago to form the Conference of Bar Association Presidents. President Gallagher tells the story in "The President's Page".

The *esprit de corps* shown by the assembled lawyers would have renewed the faith of the most skeptical in the high purpose and effective power of the American lawyer. There was not the slightest hesitancy on the part of the members of each of the state associations to combine the strength of its influence, intellect and resolution with that of the American Bar Association wherever the fields of the respective organizations coincided.

The most impressive feature of the debate was the complete preoccupation of all present with the problem of increasing the efficiency of the Bar in the fulfillment of its function of public service. The expression "public relations" was heard over and over again, but no one suggested any means of improving those relations other than an increase of the usefulness of the lawyer that would entitle him to higher regard in the mind of his fellow man.

It would have been a perfect opportunity for those interested only in their own pocketbooks to discuss ways and means of making the law over from a learned profession into a lucrative business, but every speaker proceeded on the assumption that the conferees had foregathered to determine what they could do for the profession, rather than what the profession could do for them.

This spirit has unquestionably existed throughout the history of the Bar and has been more than mere benevolence, but never before have the prospects been so bright for turning what too often has been only a local blessing into effective country-wide service. No longer will some brilliant contribution to the administration of justice lie buried in the files of the bar association of some small city or some wise device for the improvement of practice be confined to the administration of the probate court of some one county. Doubtless instances like the distribution at the conference of the *Minimum Standards of Judicial Administration* will be multiplied. All the resources of the profession, whether located at the city, county, state or national level, will hereafter be at the service of any part or of the whole.

■ The Communists, the Judge and the Press

A few months ago the public press carried large headlines announcing the conviction of eleven Communist leaders in the nine months' trial in New York City. The same press and most national magazines were extolling the fairness, impartiality, and firmness of Judge Harold R. Medina, who wound up the long spectacle by adjudging the five lawyers and one defendant, guilty of contempt.

At the same time there was being circulated to bar associations and members of the Bar throughout the country a sixty-seven-page pamphlet entitled "Due Process in a Political Trial—The Record vs. The Press", purporting to be an abstract of the record in the trial of the eleven Communists in the New York Federal District Court. The pamphlet was distributed by the "National Non-Partisan Committee To Defend The Rights of The Twelve Communist Leaders".

The pamphlet "is addressed to the judicial conduct of Judge Medina" and attacks the accuracy of the newspaper reports concerning alleged misconduct of counsel and the fairness of the judge. Quoting, by way of preface, extensively from the "Canons of Judicial Ethics" and other authorities on judicial and professional conduct, the pamphlet attempts through sixty pages of brief excerpts from the 21,000 page record (see *Time*, October 24, 1949) to establish misconduct of the judge during the trial in the following categories:

- (a) Rulings which tended to silence and immobilize defense counsel;
- (b) Improper characterizations of defense counsel in the presence of the jury;
- (c) Discriminatory treatment of defense counsel as compared with the treatment of the prosecution;
- (d) Threats to penalize defense counsel for the performance of their duty;
- (e) Discriminatory application of rules of evidence to the defense as compared with the prosecution;
- (f) Badgering of defendants and defense witnesses contrasted with courtesy and helpfulness to prosecution witnesses;
- (g) Deprecation of the defendants' evidence in the presence of the jury;
- (h) Attributing to the defense ulterior and improper motives in the presence of the jury.

Of course, claims of error that are based on the alleged misconduct of the judge would, if well taken and not cured elsewhere, render unnecessary any appellate court decision on the constitutionality of the Smith Act under the First Amendment. Obviously, such pamphlet attacks on the trial court when based on short isolated excerpts torn from their context in a 21,000 page record must be scanned with question; and when the attack is subjoined with another on the fairness of the reporting of the American press, which had many representatives in constant attendance throughout this record-breaking trial, and which has shown itself eternally vigilant in matters pertaining to freedom of speech and of the press, one wonders about the purpose and efficacy of the entire effort.

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MISCELLANEA

THE OLD HOKUM BUCKET by Ernest Rogers, a columnist for *The Atlanta Journal*, recently published by Albert Love Enterprises, contains a tribute to a beloved and distinguished member of the American Bar Association. In a chapter entitled "Bravest of All", Mr. Rogers writes as follows:

During a somewhat extended period of newspapering I have encountered many courageous men.

* * *

But in my book the most courageous man I ever knew is John M. Slaton, former Governor of Georgia, who, in a moment of great decision, revealed manhood at its best—courage of so high an order as to be beyond the comprehension of lesser men.

Before 49-year-old John M. Slaton in 1915 there was placed a legal and moral issue which he faced unflinchingly and with the banners of courage flying high.

He was Governor of Georgia with but a few more days to serve when the moment of decision arrived. As chief executive of the state he was called on to decide whether Leo M. Frank should be executed for the murder of Mary Phagan or be given a commuted sentence.

The trial of Leo Frank was one of the most sensational in the history of the American courts. Emotions had been fanned to flame by partisans who believed Frank blameless and others who were convinced of his guilt. Frank's appeals had been denied by the trial judge, the Supreme Court of Georgia and the Supreme Court of the United States.

But there remained in the minds of many a serious doubt as to the guilt of the convicted man. Many questioned whether he had been given a fair trial. Racial hatreds had bared their fangs.

Among those who doubted was John M. Slaton. He had studied the case in all its details. He had been subjected to pressures such as have rarely borne down on any public man. But despite all the arguments and pressures he was not convinced of Frank's guilt or that he had been given a fair trial.

He knew that the popular thing to do would be to let the law take its course. By doing nothing he could stand aside, allow Frank to be executed and avoid the wrath of those thirsting for his blood.

But as a lawyer and as a man John M. Slaton could not take that course. So, on a fateful day in 1915 he commuted the death sentence of Leo M. Frank to life imprisonment—and the storms broke about him. Mobs surrounded his home; many threats were made on his life.

At 49, John M. Slaton had compiled an impressive record as a political leader in Georgia. He had served with distinction in the General Assembly. He had made the state a superb Governor. It was freely predicted that he would go on to the United States Senate and perhaps even higher places in our government.

But on a June Sabbath in 1915 he dictated a document that brought to a close his political career. It was the order commuting the sentence of Leo M. Frank—a man known to him only as a name, because they never met—from death to life imprisonment. As he signed his name to the legal instrument such political dreams as he may have dreamed were shattered against the treacherous breakers of intolerance and mob resentment.

As a matter of fact, Governor Slaton's great sacrifice was nullified a few weeks later when a mob took Leo Frank from the state prison in Milledgeville and hanged him near Marietta, Ga., the home town of Mary Phagan.

I once asked Governor Slaton if he thought of his political future as he framed the commutation sentence.

"If I did", he replied, "it made no difference. I had a duty to perform and I did it. If I had taken any other course I would have considered myself a coward and a murderer."

Weary from the ordeal of dictating the order of commutation, Governor Slaton ascended to the upstairs of his home on Peachtree Road where his wife was waiting to learn of his decision.

"What have you decided?" she asked.

"I have decided to commute Frank's

sentence, although it may cost me my life", he replied.

Mrs. Slaton's comment at that time still glows in the heart of the Governor, although it was made more than three decades ago.

"I would rather be the widow of a brave man", she told him, "than the wife of a coward".

Since those testing days Governor Slaton has enjoyed a brilliant career in the law where his vast abilities have been recognized and applauded. At 83 he remains vigorous and forceful.

And every time I see him—which is frequently—I say to myself:

"Here is the bravest man I ever knew—a man who experienced a moment of high courage such as seldom illuminates a human soul".

A DESPATCH in the *San Francisco Chronicle* notes the following:

Federal Judge Harold Medina was forced to make his way through a line of about eighty pickets last night in order to enter the Press Club at 449 Powell Street for a dinner engagement.

Two police officers and a police lieutenant accompanied the Judge through the line while the pickets booed and waved placards reading: "Who will be next?" and "Barring attorneys is dangerous."

Judge Medina presided over the stormy New York Communist conspiracy trial, which ended last November in the conviction of the Nation's eleven top Communists and contempt sentences for their six attorneys.

The 62-year-old Judge was a guest of the Press Club at one of its regular Friday night "gang" dinners.

The pickets were identified with the San Francisco Civil Rights Congress and said they were protesting Judge Medina's contempt citations against the attorneys.

After distributing a pamphlet charging Judge Medina with being the man "most directly responsible" for conviction of the eleven top Communists, they dispersed.

The pamphlet also attacked the New York contempt citations against the attorneys, charging their effect spread to San Francisco where Federal Judge George Harris cited two attorneys defending Harry Bridges.

Review of Recent Supreme Court Decisions

APPEAL AND ERROR

Judgment Adverse to Government in Its Suit Under Sherman Act Upheld Where Evidence Would Support Conclusion Either Way

■ *United States v. Yellow Cab Company*, 338 U. S. 338, 94 L. ed. Adv. Ops. 123, 70 S. Ct. 177, 18 U. S. Law Week 4040. (No. 22, decided December 5, 1949.)

This was a suit in equity, under Sections 1 and 2 of the Sherman Act, which originally contained three charges of violation. The Supreme Court earlier held that one charge did not state a case, and the District Court found that the second and third were not proved. No appeal was taken as to the second. The third, a charge of conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in four large cities, was brought before the Supreme Court on direct appeal under the Expediting Act, 15 U.S.C. § 29.

Mr. Justice JACKSON, speaking for the Court, sustains the findings of the District Court that the charge was not proved. The Government asks in effect that the Court try the case *de novo* on the record, he says, alleging that the trial court ignored substantially all the facts that the Government deemed significant and that it accepted "uncritically" defendants' evidence. The judgment below is supported by an "opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings," he says. "To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations." "The Government has failed to establish any greater grievance here than it might have in any case where the evidence would

support a conclusion either way but where the trial court has decided to weigh it more heavily for the defendants," he concludes.

Mr. Justice DOUGLAS and Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice BLACK, joined by Mr. Justice REED, wrote a dissenting opinion. The District Court held that, despite an integration of corporate management, there was no deliberate intent or purpose to violate the Sherman Act, he says, adding that he thinks that a formed intent to restrain is not always necessary to support a finding of violation of the antitrust laws. The allegations were sufficiently broad to present the issue whether competition was hobbled by defendant's business arrangements, he says. There was evidence, he notes, that, if accepted, would support a finding of illegal restraint of trade. He would remand for findings on that aspect which were absent in view of the trial court's view that a subjective intent to restrain was necessary. Y.

The case was argued by Charles H. Weston for the United States, and by Jesse Climenko for the Yellow Cab Company.

COMMERCE

Activities of Local Natural Gas Distributing Company Between Wholesalers' Lines and Distributors' Pressure Reducing Station Held Subject to Natural Gas Act

■ *Federal Power Commission v. East Ohio Gas Company*, 338 U. S. 464, 94 L. ed. Adv. Ops. 213, 70 S. Ct. 266, 18 U. S. Law Week 4080. (No. 71, decided January 5, 1950.)

The East Ohio Gas Company is engaged in the business of supplying natural gas to consumers in Ohio. It owns 150 miles of high pressure pipe lines, all located within the state, which connect inside the Ohio

boundary with interstate lines owned by other companies. The Federal Power Commission, after hearings, determined that East Ohio was a natural gas company subject to its jurisdiction and ordered it to keep accounts and submit reports as required by the Natural Gas Act, 52 Stat. 821. The Court of Appeals for the District of Columbia reversed the Commission's order on the ground that the company was not "engaged in the transportation of natural gas in interstate commerce within the meaning of the Act."

The Supreme Court reversed in an opinion delivered by Mr. Justice BLACK. He declared that the continuous flow of gas from other states to and through East Ohio's lines constitutes interstate commerce. "The gas does not cease its interstate journey the instant it crosses the Ohio boundary or enters East Ohio's pipes, even though the Company operates completely within the state where the gas is finally consumed," he says. He cites the language of the Natural Gas Act (which says that the Act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution.") East Ohio's contention that the word "transportation" applies only to companies that transport gas in interstate commerce for hire or for sales followed by resales is without merit, he says, since throughout the Act transportation and sale are treated as separate subjects of regulation, and East Ohio's interpretation of the Act would deprive the Commission of power to

Reviews in this issue by Mark H. Johnson and Rowland L. Young.

carry out one of the major policies of the Act. The legislative history of the Act, he continues, shows that Congress intended the federal commerce power to cover the high pressure trunk lines to the point where the pressure of the gas is reduced and it enters local mains, while the state alone has control after the gas enters the local mains. Previous decisions of the Court to the effect that the states could regulate only after the pressure was reduced were repeatedly called to the attention of Congress, he says, and this left a "gap" where state power could not reach high pressure trunk lines and sales for resale. It was Congress' purpose to close this "gap", he declares, not, as East Ohio contends, to provide federal regulation only for those companies that the states could not regulate and thus exclude the pre-reduction activities of East Ohio claimed by it to be subject to state regulation. The Act does not attempt to abolish all overlapping between federal and state authority, and there is nothing to indicate that Congress meant to create an exception for every company transporting interstate gas in only one state, he concludes. He also dismisses East Ohio's contention that the records required by the Commission would impose so great a burden upon it as "to make such orders transgress statutory and constitutional limits," saying that the evidence does not support the claim.

Mr. Justice DOUGLAS and Mr. Justice BURTON took no part in the consideration or decision of the case.

Mr. Justice JACKSON, with whom Mr. Justice FRANKFURTER agreed, wrote a dissenting opinion. The purpose of the Natural Gas Act, he says, was to supplement, not supplant, state regulation, by setting up machinery to fix the import price of out-of-state gas. He declares that since all East Ohio's operations are conducted in Ohio, that state is able to supervise and regulate "completely and continuously". The Commission has ordered East Ohio to change its entire accounting system at a heavy cost, he continues, and this requires it to conduct its ac-

counting contrary to Ohio law or perhaps keep two sets of books. The Court seizes upon the point at which pressure is reduced prior to distribution to the consumer as the dividing line between federal and state power, he says, but nothing in the history of the Act mentions such a point, nor had any prior opinion held that intrastate lines, within or without the pressure reduction area, were beyond state regulatory power, he observes. Y.

The case was argued by Bradford Ross for the Commission, by William B. Cockley for East Ohio, and by Harry M. Miller for the State of Ohio and the Public Utilities Commission of Ohio.

CONSTITUTIONAL LAW

Freedom of Speech and Assembly—Validity of State Statute Prohibiting Unlawful Assembly Near Labor Dispute Upheld

■ *Cole v. Arkansas*, 338 U. S. 345, 94 L. ed. Adv. Ops. 139, 70 S. Ct. 172, 18 U. S. Law Week 4042. (No. 62, decided December 5, 1949.)

Cole and another were convicted under an Arkansas statute for their part in a disturbance at a strike-bound plant in which a man was killed. The Arkansas statute, Act 193, § 2, Acts of Ark. 1943, provides: "It shall be unlawful for any person acting in concert with one or more persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more persons, to promote, encourage or aid any such unlawful assemblage." The Supreme Court of Arkansas affirmed conviction, and the Supreme Court of the United States reversed (333 U. S. 196) because of an alleged variance between the section of the statute upon which affirmance was based and the section for violation of which petitioners were convicted. On this second appearance of the case before the Supreme Court, petitioners con-

tend that the case was submitted to the jury on the theory that nothing more was needed to convict than the mere presence at an assemblage where violence occurred without their participation, concert or previous knowledge. They contend that the statute was so vague and indefinite as to amount to a deprivation of due process and an impairment of the rights of freedom of speech and assembly.

In an opinion written by Mr. Justice JACKSON, the Supreme Court upheld the conviction. He notes that the statutory text and the charge of the trial court both negative the idea that mere presence at the scene of the disturbance was punishable. As for the argument as to the vagueness of the statute, he says that the Court think its meaning is clear to "men of ordinary intelligence".

Mr. Justice DOUGLAS took no part in the consideration or decision of the case. Y.

The case was argued by Thomas E. Harris for Cole, and by Jeff Duty for the State of Arkansas.

CONSTITUTIONAL LAW

Question of Validity of "Loyalty Check" of County Employees Held Not Ripe for Decision by Supreme Court

■ *Parker v. Los Angeles County, Steiner v. Los Angeles County*, 338 U. S. 327, 94 L. ed. Adv. Ops. 133, 70 S. Ct. 161, 18 U. S. Law Week 4045. (Nos. 49 and 50, decided December 5, 1949.)

In 1947, the Los Angeles County Board of Supervisors required each county employee to execute an affidavit stating that he would support the Constitution and forswearing membership in any organization that advocates overthrow of the Government by force. The affidavit also required the employee to list all aliases and to indicate whether he had ever supported any organization on a list of 145 considered to be subversive. Petitioners brought these actions in the California courts alleging that the Federal Constitution and California law barred coercive measures to secure obedience to the alleged affidavit requirement. Demurrers to

the complaints were sustained by the state Superior Court, and its judgment was affirmed by the state District Court of Appeal. The state Supreme Court denied discretionary review, and the United States Supreme Court granted certiorari.

In an opinion by Mr. Justice FRANKFURTER, the writ was dismissed on the ground that the constitutional issues presented were not ripe for decision. He notes that sixteen of the county employees had refused to execute the affidavits, and had been discharged for noncompliance with the Board of Supervisors' order. He says that the petition of sixteen of the discharged employees for a writ of mandate from the Superior Court to review the action of the Civil Service Commission is now pending, and declares that, "Decent respect for California and its courts demands that this Court wait until the State courts have spoken. . . ."

Mr. Justice DOUGLAS took no part in the consideration or decision of the cases. Y.

The cases were argued by John T. McTernan and A. L. Wirin for the petitioners, and by Gerald G. Kelly for Los Angeles County.

EMINENT DOMAIN

Method of Determining Fair Value of Property Requisitioned by United States, Absent Market Price, Is Defined

■ *United States v. Toronto, Hamilton and Buffalo Navigation Company*, 338 U. S. 396, 94 L. ed. Adv. Ops. 162, 70 S. Ct. 217, 18 U. S. Law Week 4049. (No. 39, decided December 12, 1949.)

In 1942, the Government, acting under the Merchant Marine Act of 1936, requisitioned respondent's Great Lakes car ferry, the *Maitland No. 1*, determining its fair value to be \$72,500. In 1943, respondent exercised its right to accept 75 per cent of the award and in 1945 brought action in the Court of Claims to recover \$711,753 as the additional amount necessary for just compensation. The Court of Claims held that the fair value of the vessel was \$161,833.72, finding that the vessel was property unique, peculiarly sit-

uated and without relative comparison on the Great Lakes. It found that there was a demand for a vessel such as the *Maitland* in Florida, but that the vessel was not equipped for salt water use; there was no finding that the respondent would have been able to sell the vessel had it been transported to Florida. The Court considered the selling price of similar vessels sold during the same period in Florida, the capitalized value of an annual income comparable to that of the *Maitland* for the sixteen years ending in 1932, (the last year the vessel was used by the respondent) the life expectancy of the vessel in salt as opposed to fresh water and the cost of conversion to salt water, of sailing the vessel to Florida, and of necessary repairs.

Mr. Justice CLARK delivered the opinion of the Court reversing and remanding. He says that ordinarily the best test of value in condemnation proceedings is the market value, but when no market exists, as here, other means of measuring value may have relevance. The *Maitland's* earnings from 1916 to 1932 are, however, irrelevant, he says, to the issue of earning capacity after 1942. The Florida demand, found by the court below, was improperly considered by the Court of Claims, he says, for the burden is on plaintiff to show that a prospective Florida buyer would have considered a ship like the *Maitland* when it was moored on the Great Lakes, or that a Great Lakes owner would have taken the trouble to send his ship to Florida for a possible sale, or that either of these possibilities would have had an effect on price in the Great Lakes. The question, Mr. Justice CLARK emphasizes, is what an ordinary businessman in the trade would have done, not what the owner claims he would do. A bare record reciting sale of five similar vessels, only one of which was sold on the Great Lakes for Florida use, does not meet that burden, he declares.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a

concurring opinion, saying that he joins in the general direction of the Court's opinion, but that "the treacherous nature of the subject matter makes appropriate a separate statement of views." He explains his objections to the standards used by the Court of Claims and concludes, "This Court should not go beyond indicating the broad lines for adjudication by the Court of Claims, leaving to that court discretion appropriate to its experience in applying the indicated standards to the facts before it." Y.

The case was argued by Paul A. Sweeney for the United States, and by Gerald E. Dwyer for the Company.

FEDERAL EMPLOYERS' LIABILITY ACT

Construction of Complaint Filed in State Court Held Not To Be Question of Local Practice

■ *Brown v. Western Railway of Alabama*, 338 U. S. 294, 94 L. ed. Adv. Ops. 93, 70 S. Ct. 105, 18 U. S. Law Week 4029. (No. 43, decided November 21, 1949.)

Brown filed suit in a Georgia court claiming damages under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, for injuries sustained when, in the course of his employment, he stepped on a large clinker in the yard of the defendant railroad. The trial court sustained the railroad's general demurrer and the Georgia Court of Appeals affirmed on the ground that the sole cause of the accident was Brown's act in stepping on the clinker, which he was able to see and presumably could have avoided. The court held that this was not an allegation of negligence under the Georgia rules of practice. The Supreme Court of Georgia denied certiorari.

Mr. Justice BLACK, speaking for the Supreme Court, reversed. The state courts are free to follow their own rules of procedure when a case under the Federal Employers' Liability Act is brought before them, he says, but they cannot of course detract from substantive rights granted by Congress. He rejects the conten-

tion that the state courts' interpretation of the complaint is a matter of procedure binding upon the Supreme Court, citing "a long line of cases . . . from which we see no reason to depart". He declares that Brown's allegations to the effect that the railroad had allowed clinkers and other debris to accumulate in the yards, knowing that this made them unsafe and that plaintiff would have to perform his duties there, would, if proved, "show an injury of the precise kind for which Congress has provided a recovery." Accordingly, the cause is reversed and remanded.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissent in which Mr. Justice JACKSON joined. If a plaintiff chooses to enforce a federal right in a state court, he remarks, he cannot be heard to object if he is treated like all other plaintiffs who press like claims under state law with respect to the form in which the claim must be stated. The Georgia court ruled that, "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence," he says, and in so doing it has not contracted rights under the federal act or hobbled plaintiff in getting a judgment to which he may be entitled.

Y.

The case was argued by Richard M. Maxwell for Brown, and by Herman Heyman for the railroad.

FEDERAL SAFETY APPLIANCE AND EMPLOYERS' LIABILITY ACTS

Equipping Car with Coupler Which Breaks and Causes Injuries Renders Railroad Liable Irrespective of Negligence

■ *O'Donnell v. Elgin, Joliet and Eastern Railway Company*, 338 U. S. 384, 94 L. ed. Adv. Ops. 170, 70 S. Ct. 200, 18 U. S. Law Week 4056. (No. 56, decided December 12, 1949.)

This was an action brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, alleging violation of the Safety Appliance Act, 45 U.S.C. § 2. Plaintiff's decedent was killed while at work for the defendant rail-

road when a coupler broke. The District Court refused to instruct the jury that a breaking of a coupler was negligence *per se*. The jury found for defendant, and the Court of Appeals sustained the refusal to give the instruction as to negligence *per se*, saying, "We do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a coupler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. . . ." The question of whether this instruction was properly denied was the sole question before the Supreme Court on certiorari.

Mr. Justice JACKSON read the opinion of the Court reversing. He says that there is much confusion as to the effect to be accorded a violation of the Safety Appliance Act and that some jurisdictions regard a breach of a statute as evidence of negligence to be weighed by the jury along with the facts, others treating it as "presumptive" evidence of negligence that defendant must overcome, still others speaking of "negligence *per se*" or *res ipsa loquitur*. Previous opinions of the Supreme Court have held that liability under the Act is not based upon the carrier's negligence, he continues, but because an action for damages resulting from a violation of the Safety Appliance Act is pursued under the Federal Employer's Liability Act, basically a form of action predicated upon negligence, many of the Safety Appliance cases use negligence language. It is important that the two actions be kept separate, he says, as this case illustrates. The Appliance Act requires equipment that will stand the stress and strain of all ordinary operation, he declares, and a defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it or by showing that it was properly manufactured, diligently inspected and showed no visible defects. "These circumstances do go to the question of negligence," he says, "but, even

if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act." (In a footnote, Mr. Justice JACKSON adds that the Court does not mean that a railroad may never "effectively defend" under the Act by showing that an adequate coupler failed to hold because it was broken through intervening and independent causes other than its inadequacy or defectiveness—as, say, the work of a saboteur.)

Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and Mr. Justice MIN-
TON took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice REED, dissented on the ground that the Safety Appliance Act does not contain a mandatory requirement that railroad cars must be equipped with couplers that "will remain coupled until set free by some purposeful act of control". In his view, he says, the broken coupler was material evidence from which a jury could infer violation of the Act.

Y.

The case was argued by Joseph D. Ryan for O'Donnell, and by Harlan L. Hackbert for the railroad.

FEDERAL SAFETY APPLIANCE AND EMPLOYERS' LIABILITY ACTS

Casual Relation Between Injury and Violation of Absolute Duty Under FSAA Question for Jury—Contributory Negligence Important Under FELA Only on Question of Damages

■ *Carter v. Atlantic and St. Andrews Bay Railway Company*, 338 U. S. 430, 94 L. ed. Adv. Ops. 183, 70 S. Ct. 226, 18 U. S. Law Week 4056. (No. 23, decided December 12, 1949.)

This was another case dealing with the Safety Appliance Act. Carter was injured in the course of his employment by the railroad when a coupler failed to operate in the course of switching cars. He brought suit under the Safety Appliance Act and the Federal Employers' Liability Act. The District Court directed a verdict for defendant on the ground that the coupler worked before the accident and worked subsequently, and that its failure to work when the ac-

cident occurred "is not per se a violation of this Act [the Safety Appliance Act]." The Court of Appeals affirmed on the theory that the failure to couple "was the remote, not the proximate, cause of plaintiff's injuries". The District Court did submit the cause on the general negligence allegation, and the jury returned a verdict for defendant. In the Supreme Court, Carter objected to the District Court's charge covering contributory negligence.

The Court, speaking through Mr. Justice CLARK, reversed. Referring to the *O'Donnell* case, *supra*, he points out that violation of the Safety Appliance Act is violation of an absolute duty, and that only the causal relationship between the injury and the violation of the Act is at issue, and that there was certainly evidence from which a jury could find such a causal relationship. He finds error in the trial judge's instruction as to contributory negligence, noting that the Act reads that the "fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The negligence of both Clark and the railroad should have been submitted to the jury, he declares.

Mr. Justice REED dissented on the ground that the failure to couple was not the proximate cause of the injury and that the deficiency in the charge on contributory negligence was cured by a later modification.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he says that "since the merits involve merely evaluation of the unique facts in the record, the case does not fall within the proper business of the Court." He would dismiss the writ of certiorari as improperly granted, he says.

The case was argued by J. Kirkham Jackson for Carter, and by B. D. Murphy for the railroad.

LABOR LAW

Under Closed-Shop Contract, Employer May, Without Committing Unfair Labor Practice, Discharge Employees Expelled from Union for Seeking New Bargaining Representative

■ *Colgate-Palmolive-Peet Company v. National Labor Relations Board*, 338 U. S. 355, 94 L. ed. Adv. Ops. 127, 70 S. Ct. 166, 18 U. S. Law Week 4037. (No. 47, decided December 5, 1949.)

The Colgate-Palmolive-Peet Company had a collective bargaining agreement with the International Longshoremen's and Warehousemen's Union, affiliated with the C.I.O., which contained a closed-shop provision. The agreement was entered into in 1941 and was of indefinite duration. In 1945, agitation among the employees of the company for a change of bargaining representative began which resulted in an unauthorized strike by a substantial majority of the employees. Some of the employees formed an independent organization which later sought affiliation with the A.F. of L. These workers were expelled by the C.I.O. for the activities in behalf of the A.F. of L. and for violation of the C.I.O. policy against strikes in wartime. The expelled workers were discharged by the company, upon demand of the C.I.O., under the closed-shop agreement. The National Labor Relations Board found the company guilty of an unfair labor practice, in violation of Section 8 (1) and 8 (3) of the National Labor Relations Act, and ordered reinstatement of the discharged employees. It applied the so-called "Rutland Court Doctrine" (*Rutland Court Owners, Inc.*, 44 NLRB 587, 46 NLRB 1040), a Board policy to the effect that an employer is not permitted to discharge employees pursuant to a closed-shop contract, even though it is valid under Section 8 (3) of the N.L.R.A., when the employer knows that the discharge is requested by the union for the purpose of eliminating employees who have sought a change of bargaining representative at a time when it is appropriate for employees to seek such a change. The

Court of Appeals for the Ninth Circuit entered a decree enforcing the Board's order, approving the application of the *Rutland* Doctrine.

Mr. Justice MINTON delivered the opinion of the Supreme Court reversing. He rejects application of the *Rutland* Doctrine, noting that the closed-shop agreement was valid both under the National Labor Relations Act and under California law, and is one of the techniques for assuring stability of labor relations—the primary objective of Congress in enacting the National Labor Relations Act. The legislative history of the Act shows that Congress knew that a closed shop would interfere with the freedom of employees to organize in another union, he says, and that this necessarily meant a limitation upon their right freely to select their own bargaining representatives, guaranteed by Section 7 of the Act. The Board cannot ignore the plain provisions of a valid contract, he declares, and reform them to conform to its own idea of correct policy. Here, the employees chose their bargaining representatives, he says, and were bound to a valid contract which was subsisting at the time in question. He holds that the employer cannot be held guilty of an unfair labor practice for carrying out the terms of the contract.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice REED and Mr. Justice BURTON dissented, stating that the Board's adjustment between the different provisions of the Act was permissible.

The case was argued by Ricardo J. Hecht for the company, and by Ruth Weyand for the Board.

PARTIES

Subrogee May Bring Suit Under Federal Tort Claims Act In Its Own Name Against United States

■ *United States v. Aetna Casualty and Surety Company, United States v. World Fire and Marine Insurance Company, United States v. Yorkshire Insurance Company, United States v. The Home Insurance Company*, 338

U. S. 366, 94 L. ed. Adv. Ops. 151, 70 S. Ct. 207, 18 U.S. Law Week 4060. (Nos. 35, 36, 37 and 38, decided December 12, 1949.)

In these cases, the Court held that insurance companies may sue the United States in their own names upon claims to which they have become subrogated by payment to an insured who would have been able to bring such an action. Each case involved a suit against the Government under the Federal Tort Claims Act. One was brought by a single insurance company which had paid the whole loss, another by an insurance company which had paid part of the loss and the injured person, and the third by two insurance companies each of which had paid part of the loss. The procedure in all three cases was upheld below. (See 34 A.B.A.J. 418 and 35 A.B.A.J. 65.)

The Court's opinion was written by the CHIEF JUSTICE. He quotes language from the Tort Claims Act, 28 U.S.C. §§ 1346 (b), 2674, which gives a plaintiff the right to sue the United States for personal injuries arising from the negligence of Government employees acting within the scope of their employment, and makes the United States liable for such claims, "in the same manner, and to the same extent, as a private individual under like circumstances. . . ." The Government relied upon R.S. § 3477, which makes "All transfers and assignments . . . of any claim upon the United States, or any part or share thereof, or interest therein . . . absolutely null and void". The CHIEF JUSTICE says that the purpose of Section 3477 was to prevent "persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government, to prevent possible multiple payment of claims by the Government, and to make it unnecessary for the Government to investigate alleged assignments of claims against it." The rigor of this rule was early relaxed, he says, in cases that were thought not to be productive of the evils against which the statute was aimed, especially in cases of assign-

ments by operation of law or involuntary assignments. The legislative history of the Tort Claims Act shows that Congress understood that subrogation claims were not within the coverage of Section 3477, he declares. When Congress wished to exclude claims by subrogees, it expressly said so in foreign claims legislation, he notes, referring to 31 U.S.C. § 224 (d). Since Section 3477 is inapplicable, the Government must defend suits by subrogees as if it were a private person, as required by the Tort Claims Act.

Mr. Justice BLACK dissented without opinion.

Mr. Justice DOUGLAS took no part in the consideration or decision of the cases. Y.

The cases were argued by Leavenworth Colby for the United States, and by William A. Hyman, Jackson G. Akin and Abraham Frankel for the insurance companies.

SHIPPING

Government Standard Bill of Lading Does Not Allow Freight Charges for Goods Not Delivered

■ *Alcoa Steamship Company, Inc. v. United States*, 338 U. S. 421, 94 L. ed. Adv. Ops. 190, 70 S. Ct. 190, 18 U. S. Law Week 4068. (No. 271, decided December 12, 1949.)

In 1942, the petitioner's ship, the *S.S. Gunvor*, was torpedoed and lost en route to Trinidad with a cargo of lumber under a government bill of lading. Under maritime law, ocean carrier freight charges are not earned unless and until the goods are delivered at their destination. However, contractual provisions establishing the shipper's liability for freight regardless of actual delivery are common stipulations in carriers' bills of lading. The sole issue before the Court here was whether the government bill of lading here in question so provided, the rule being expressed on the government form that shipments of government property are subject to the conditions of the carrier's usual contract of carriage unless otherwise specifically provided "hereon". The Comptroller General disallowed payment of freight charges

on the ground that the freight had not been earned. Petitioner sued in the District Court to recover the freight charges. The Court of Appeals for the Second Circuit reversed the lower court's judgment in favor of the carrier, finding in the provisions of the Government's bill of lading a "carefully devised plan" to pay freight charges only if the shipment actually arrived at its destination.

Speaking for the Supreme Court, Mr. Justice REED affirmed the Court of Appeals' decision. He refers to the language of the bill which conditions payment of freight charges upon the bill's being "properly accomplished". Other clauses in the bill indicate that the bill could not have been "properly accomplished" until delivery of the goods, he says. Payment is conditioned upon submission of an authorized government form voucher, he notes, and the language of this voucher says that "Payment for transportation charge will be made only for the quantity of stores delivered at destination". If one were to accept the carrier's argument that the provision in the voucher should be disregarded in view of the limitation in the bill of lading to matters specifically provided "hereon", the reasoning would lead to the conclusion that the freight is earned without delivery, he says, but that payment will be made only upon a voucher that expressly denies right to payment without delivery. The terms of the bill specifically condition payment upon delivery, he concludes, and accordingly, the decision of the Court of Appeals was correct.

Mr. Justice FRANKFURTER and Mr. Justice BURTON dissented on the grounds expressed in the opinion of Judge Augustus N. Hand in the Court of Appeals.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case. Y.

The case was argued by Melville J. France for the Alcoa Steamship Company, and by Samuel D. Slade for the United States.

TAXATION

Income Tax Exemption of Military Officers Is Denied to Civil Service Employee Temporarily Enrolled as Coast Guard Officer

■ *Commissioner v. Connelly*, 338 U.S. 258, 94 L. ed. Adv. Ops. 24, 70 S. Ct. 19, 18 U.S. Law Week 4002. (No. 57, decided November 7, 1949.)

Prior to 1949, partial exemption was allowed for "compensation received . . . for active service as a commissioned officer . . . in the military or naval forces of the United States". Exemption was claimed under this statute by a civil service employee whose office was transferred to the Coast Guard during the war, and who was enrolled as a temporary commissioned officer.

The exemption was denied in an opinion by Mr. Justice MINTON. The opinion states that the taxpayer received his pay "in a civilian status", and that he was given "just enough military status to enable him effectively to carry out his duties". J.

The case was argued by Ellis N. Slack for the Commissioner, and by Caesar L. Aiello for Connelly.

TAXATION

Federal Admissions Tax Applies to Amounts Charged by State Instrumentality for Admission to and Use of Bathing Beach

■ *Wilmette Park District v. Campbell*, 338 U. S. 411, 94 L. ed. Adv. Ops. 177, 70 S. Ct. 195, 18 U.S. Law Week 4053. (No. 75, decided December 12, 1949.)

This is a suit for refund of the federal admission tax paid by a local park district of Illinois, which operated a public bathing beach with appropriate facilities. It charged either on the basis of a daily fee or on the basis of a season ticket, which charges approximated costs of maintenance and improvements. The tax was imposed upon "the amount paid for admission to any place, including admission by season ticket or subscription". The tax was sustained in an opinion by Mr. Justice CLARK.

The opinion first disposes of the taxpayer's arguments that the statute is inapplicable. The beach area was a "place" within the meaning of the statute; the tax is not limited to spectator entertainment. Moreover, the charge is for "admission" even

though it contemplates the "use" of the property and facilities. There is no foundation in the statute's history for the exemption of nonprofit activities or activities conducted by a municipality.

The taxpayer also invoked the constitutional immunity of state instrumentalities from federal taxation, arguing that the activity in question qualified as an essential government function. The Court found it unnecessary to determine the issue of essentiality, because it found that the burden of the tax on the state was "speculative and uncertain". The opinion concedes that the passing on of the tax might "to an undeterminable extent adversely affect the volume of admissions", but states that the tax "is so imposed as to facilitate absorption by patrons", and that there is no evidence that the governmental unit "will be forced to absorb the tax in order to maintain the volume of its revenue and the availability of its benefits." J.

The case was argued by Henry J. Brandt for the Park District, and by Lee A. Jackson for the Commissioner.

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Courts, Departments and Agencies

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Aliens . . . inheritance . . . German nationals residing in Germany cannot inherit personal property of California citizen who died in 1944, in absence at that time of reciprocal inheritance rights of American citizens under German laws as required by California succession statutes.

■ *In re Estate of Paul Hess*, Calif. Superior Ct., January 23, 1950, Clark, J.

The question confronting the Court was whether German nationals residing in Germany could inherit personal property from an American citizen who died in California in 1944. According to California laws of succession as they existed on the date of death, the inheritance rights of nonresident aliens depended upon the existence of reciprocal rights on the part of United States citizens to inherit property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens were inhabitants and citizens. Although such reciprocal inheritance rights were shown to have existed in this case up to the time Hitler came into power, § 48 of the German "Law of 1938" provided that a disposition by cause of death was null and void insofar as it was contrary, in a way which was "thoroughly opposed to a healthy national sentiment", to considerations which a decedent who was "conscious of his duties, must have toward family and the national community".

On the basis of a finding that the German inheritance laws in 1944 did not provide the requisite recip-

cal rights for American citizens, the Court held that the German nationals could not inherit from the instant decedent. Although no decision by German courts interpreting § 48 was brought to the Court's attention, reference was made to statements in the commentaries of two German authorities receivable in German courts that this section would render void any disposition by inheritance to an enemy national. The Court itself deemed it inconceivable that an allowance of inheritance by enemy nationals would be in accordance with "healthy national sentiment" as the Nazis conceived it. Noting on the one hand that the Court knew of no instance where any inheritance from a decedent dying during the Nazi regime and while the United States was at war with Germany had been received by an American heir of a decedent German resident national, the Court pointed out on the other hand that, under § 39 of the Trading with the Enemy Act (1948), any inheritances of enemy nationals which were vested in the Attorney General of the United States were confiscated. The Court observed: "It is difficult to believe that the Hitler government was more sensitive to the rights of enemy aliens than the United States."

Aliens . . . denaturalization . . . alien's consent to denaturalization judgment based on fraudulent procurement of naturalization held sufficient as substitute for proof to support judgment, even though matters charged in denaturalization complaint related to conduct subsequent to naturalization.

■ *U. S. v. Eichenlaub*, C. A. 2d, February 3, 1950, Chase, C. J.

In 1944 appellant filed a written consent, countersigned by his attorney, to the entry of judgment in a denaturalization proceeding revoking his naturalization and canceling

his certificate of citizenship. The complaint in that proceeding alleged that appellant's naturalization was fraudulently and illegally procured in that after his naturalization he had acted as a German agent in the United States seeking to advance German interests, that he did not intend to renounce fidelity to the German Reich or to support the Constitution, and that he took the oath of allegiance with a mental reservation that nullified it. Appeal was taken in the instant action from an order of the United States District Court for the Southern District of New York denying appellant's motion, made in 1946 under Rule 60(b), to vacate the consent judgment. It was contended that, as a matter of law, a consent to a judgment in denaturalization proceedings based on fraud was insufficient as a substitute for the "clear and convincing" evidence required to support such a judgment.

Affirming the order below denying appellant's motion, the Court held that his formal consent, given with the knowledge and approval of counsel, to the denaturalization judgment was sufficient as a substitute for proof, regardless of the standard of proof required, to support the judgment. Such a consent judgment was deemed the equivalent of a plea of guilty or a plea of *nolo contendere* to a criminal charge. Although it was conceded that the Government would have been limited in its proof to the matters charged in the complaint, the Court rejected appellant's contention that, under *Baumgartner v. United States*, 322 U. S. 665, the complaint was insufficient to support a judgment based on fraud where the matters charged related mainly to conduct which occurred subsequent to naturalization. The Court asserted that the majority in the *Baumgartner* case simply held

EDITOR'S NOTE: The omission of a citation to the United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

that, on the facts presented, evidence of the alien's subsequent attitude afforded "insufficient proof" of his earlier intent.

Frank, C. J., dissenting, maintained that, in the light of the *Baumgartner* case, even if the allegations in the complaint as to appellant's activities as a German agent had been established by evidence beyond possible doubt, they would not have sustained the judgment. He also pointed out that it would not appear that appellant was precluded from seeking, by filing a new motion under Rule 60(b) as amended in 1948, to vacate the consent judgment on grounds asserting appellant's limited knowledge of the English language and lack of understanding as to the nature of his consent.

Carriers . . . torts . . . certificated interstate motor carrier held not liable for torts committed by independent contractor while empty truck was homeward-bound after expiration of "one-way lease".

■ *Costello et al. v. Smith et al.*, C. A. 2d, January 19, 1950, Swan, C. J.

Among defendants in a tort action arising from an automobile collision was a certificated interstate motor carrier, which had hired the truck involved for a one-way interstate trip. The noncertified owner furnished the driver and was deemed an independent contractor. The accident occurred in Connecticut while the empty truck was homeward-bound after completion of the leased trip. The jury brought in verdicts for plaintiffs against the owner and the driver, verdict in favor of the certificated carrier having been directed. The directed verdict was affirmed on appeal.

The Court maintained that the instant case was not, by virtue of either federal statute or local Connecticut law, within the rule under which one who can lawfully operate only under a public franchise cannot escape liability by engaging an independent contractor to perform the activity. On the federal level, the Court rejected plaintiff's argument that the policy of the Interstate Com-

merce Act to protect the public would be subverted by failure to impose liability during the return, as well as during the outbound, trip; such continuing regulation of carriers after expiration of a "one-way lease" was deemed a matter for Congress or the Commission rather than the courts.

Turning to local law, the Court professed lack of knowledge of any Connecticut decision that permitted or required the imposition of such liability. Nor was the Court willing to rely upon § 427, *Restatement, Torts*, which would impose liability on the employer of an independent contractor to do work "inherently dangerous to others," since there was some doubt whether a trailer-truck was "inherently dangerous" for purposes of § 427, and since, in any event, the employment ceased upon expiration of the lease.

Constitutional Law . . . personal, civil and political rights . . . in absence of inequality of treatment, separate racial school system in District of Columbia upheld as not forbidden by Federal Constitution.

■ *Carr v. Corning et al.*, C.A. D.C., February 14, 1950, Prettyman, C.J.

In a class action brought on behalf of all Negro children of school age in the District of Columbia averring the denial of equal schooling to Negro pupils by reason of the compulsory racial segregation in the school system and asking that Negro pupils be permitted to attend the schools most adjacent to their homes without regard to racial designation, the Court, by a two-to-one decision, found that there was no inequality of treatment and ruled that the maintenance of separate public schools was not forbidden by the Federal Constitution. No evidence of discrimination against Negro children in the assignment of school buildings was found by the majority in either the permanent building program or in the temporary expedients adopted by the Board of Education to meet problems of overcrowding. Upholding the right of Congress to provide for segregated

schools, the majority asserted that it was never intended that the Constitution foreclose legislative treatment of the problem of segregation. Rather, it was said, the problems arising from the social and economic interrelationship of the two races "lie naturally" in the field of legislation, "a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstances." Emphasis was also placed on the holdings of the Supreme Court that constitutional invalidity did not arise from the mere fact of segregation but was founded on inequality of treatment.

Edgerton, C.J., dissenting, maintained that racial segregation in the public schools was unconstitutional. Relying largely on the findings of the Strayer survey of local schools, which the majority refused to note as not being in the record, Edgerton, C.J., considered inescapable the conclusion that great inequalities existed between the white and colored school systems. Assertions as to good intentions on the part of defendants or the claim that any inequalities fell indiscriminately on both white and colored students were not considered an answer to the question presented. He maintained that the objective equality "clearly required" could not be attained without abolishing segregation. It was pointed out that, if it were assumed that objective equality could be attained, the question whether enforced segregation in public schools would then be valid would become one upon which the Supreme Court had never squarely ruled. It was his position that educational segregation would still affect Negroes unequally by indorsing and preserving their subordinate status, by preventing early contact and mutual acquaintance between a dominant majority and a depressed minority, and by inflicting an economic and social handicap on the less privileged minority.

Constitutional Law . . . personal, civil and political rights . . . complainant taxpayers and voters contesting the constitutionality of Maryland's Sub-

versive Activities Act held lacking sufficient interest to maintain suit . . . no justiciable controversy deemed presented in action by members of Communist Party of Maryland attacking Act as bill of attainder.

■ *Hammond, Attorney General of Maryland, et al. v. Lancaster et al.*, Ct. of Appeals of Md., February 9, 1950, Henderson, J.

■ *Hammond et al. v. Frankfeld et al.*, Ct. of Appeals of Md., February 9, 1950, Henderson, J.

Reversing the judgment below, the Court of Appeals in this action reinstated Maryland's "Subversive Activities Act of 1949" (Ch. 86 of Maryland Acts of 1949) and the Emergency Act (Ch. 310) upon appeal from the decision of Judge Sherbow of the Circuit Court Number 2 of Baltimore City that the Acts were unconstitutional (see review in 35 A.B.A.J. 850). The Subversive Activities Act, also known as the "Ober Bill", forbade membership in or support of subversive organizations, required loyalty oaths of public employees, candidates for public office and teachers in state-aided schools, proscribed from public employment persons who there were "reasonable grounds to believe . . . are subversive", and provided for penalties of imprisonment and loss of civil rights for violations. Chapter 86 was approved by the Governor on March 31, 1949, to become effective June 1, 1949, as provided in § 3 of the Act. The Emergency Act, approved April 22, 1949, repealed and reenacted § 3, with amendments, so as to declare Ch. 86 to be an emergency measure to take effect from the date of its passage. Upon petition filed with the Secretary of State, a public referendum on Ch. 86 was scheduled for November, 1950. In the absence of a valid emergency declaration in the law such a petition would have stayed its enforcement.

Henderson, J., writing for the majority of the Court, deemed the validity of the Emergency Act to be the only issue properly before the Court, and held that there was no justiciable case presented as to the provisions of Ch. 86. The Court ruled that the

declaration of an emergency in a separate and subsequent amendment was in substantial compliance with Maryland's Constitution, that the legislative determination as to the existence of an emergency was not judicially reviewable, that the emergency provision had not in fact operated retroactively, since it was found to relate back to April 22 rather than to March 31, 1949, and hence was not an *ex post facto* law.

In declining to rule on the validity of the Subversive Act, the Court maintained that it was beyond its power to adjudicate constitutional issues at the instance of complainants who, as taxpayers and voters, were threatened with neither prosecution nor injury under the Act nor possessed of sufficient monetary interest to entitle them to maintain the suit. "If the present Act is approved by the voters and an accused is convicted under it," the Court stated, "it will be time enough to consider the Act, in its application to particular circumstances and a particular defendant. . . ." Neither did the Court find, in the absence of a showing of unconstitutional discrimination, any justiciable controversy as to the validity of the requirement of an affidavit of non-subversiveness of candidates for public office.

Henderson, J., did, however, say: "It can hardly be denied that a statute which makes it a crime to attempt or conspire to overthrow the government by force or violence, or to incite others to do so, or to aid or abet others to do so, is within the legislative power, if the statute or the application of it is limited to conduct, including words which 'seriously and immediately threaten' to overthrow the government by force or violence."

The majority similarly ruled in the *Frankfeld* case that the constitutionality of the Subversive Activities Act was not in issue, despite the contentions of the Chairman and Labor Secretary of the Communist Party of Maryland that as complainants they had a special interest to attack the Act as a bill of attainder directed

against them and the Communist Party of Maryland, and that certain recitals in the Act concerning the purposes and nature of the political organizations espousing the philosophy of Communism represented a legislative finding of guilt in contravention of the state and federal constitutions.

In a minority opinion, Chief Judge Marbury, who was joined by Collins, J., concurred generally with the majority but argued that its decision should have ruled on the constitutionality of certain parts of the Subversive Activities Act. In his opinion, the Act in its main aspects should have been held valid. The requirement of loyalty affidavits from would-be political candidates was not deemed to constitute an additional oath of office in violation of the Maryland Declaration of Rights, but merely a means of assuring the voters that those whose names appeared on the ballots were *prima facie* qualified for the offices sought. Observing that "It is an arrogant assumption that a government cannot protect itself against the infiltration of those who desire to destroy it by force," Marbury, Ch. J., would uphold the right of the state not to employ persons believed to be subversive. He also maintained that the complainants in the *Frankfeld* case were entitled to know whether the Act was a bill of attainder against them, stating "I do not think it is, and I think we should say so." It was pointed out that there was no attempt in Ch. 86 to name any person or organization as coming within its criminal provisions, and that the Act "in no way prevents a fair and judicial trial for any one, nor does it condemn unheard the Communist Party or any one of those belonging to that party."

Corporations . . . stockholders' suits . . . majority of corporation's board of directors are not indispensable parties to shareholder's action to compel the declaration of dividends.

■ *Kroese v. General Steel Castings Corp. et al.*, C.A. 3d, January 31, 1950, Goodrich, C.J.

The question presented was wheth-

er a majority of a corporation's board of directors were indispensable parties to an action by a shareholder to compel the declaration of dividends. The complaint alleged that in refusing to declare dividends on the preferred stock the directors were acting primarily in the interest of the four major common shareholders they represented. The action was instituted by plaintiff, a resident of New York, against defendant Delaware corporation, whose principal office was in Pennsylvania, in the Federal District Court for the Eastern District of Pennsylvania. Only three of the corporation's twelve directors were served, plaintiff stating that there was no one state or federal district court in which a majority of the board could be served. Defendant's motion to dismiss the complaint was sustained by the District Court on the ground that the court lacked personal jurisdiction over a majority of the board of directors and hence was powerless to grant relief in their absence. The judgment was reversed on appeal.

Noting the absence of an "all fours" decision upholding plaintiff's position, the Court of Appeals ruled that a majority of the corporation's board of directors were not indispensable parties to a lawsuit to compel the declaration of dividends. Refusing to proceed with the "mechanical application" of the well-settled rule about jurisdiction *in personam*, the Court maintained that where in a case of fiduciary mismanagement the court was called upon to substitute its judgment, based on a rule of law, for the ordinary business judgment of the directors, the normal declaration of dividends procedure followed by the board of directors could be by-passed. Accordingly, any formal action taken by the directors following a court decree ordering the payment of dividends was deemed to be "nothing but a ministerial act". As for the problem of effectuating the chancellor's action where the directors were not subject to his jurisdiction, the Court stated that, if the formal act by the board of directors was neces-

sary under the Delaware General Corporation Law to regularize the dividends to which shareholders were entitled, "we cannot think that a receivership or sequestration of a foreign corporation's property will not produce the result". A directly contrary decision reached by the Court of Appeals for the Sixth Circuit in *Schuckman v. Rubenstein*, 164 F. (2d) 952 (1948), *cert. den.* 333 U. S. 875, was distinguished on the assumption that it merely expressed the difference between Ohio law governing in that case and Pennsylvania law applying in the instant case. The case was remanded for a hearing on the merits.

Courts . . . federal courts . . . federal court held to have, in absence of diversity of citizenship, jurisdiction under 28 USC § 1338 (b) of new Judicial Code of nonfederal unfair competition claim joined with federal patent infringement claim, although substantial additional proof would be necessary to establish unfair competition.

■ *Schreyer et al. v. Casco Products Corp. et al.*, U.S.D.C., D. Conn., January 24, 1950, Smith, D.J. (Digested in 18 U. S. Law Week 2374, February 21, 1950).

Denying defendants' motion to dismiss for lack of diversity of citizenship, a nonfederal claim for unfair competition which was joined with a federal claim of patent infringement, the Court held that under revised 28 USC § 1338 (b) of the new Judicial Code the test of federal jurisdiction over the joined nonfederal claim was substantial identity of right invaded, rather than substantial identity of proof. The result here obtaining was said to be in conformity with the interpretation of the United States Supreme Court's decision in *Hurn v. Oursler*, 289 U. S. 238 (1933), as set forth by Judge Clark of the Court of Appeals for the Second Circuit in his dissenting opinions in *Zalkind v. Scheinman*, 139 F. (2d) 895, (1943), and *Musher Foundation v. Alba Trading Company*, 127 F. (2d) 9 (1942).

The Court ruled that, even though

substantial additional proof would be necessary to establish the claim of unfair competition, it had jurisdiction since plaintiffs' right "to sole enjoyment of the fruits of the inventor's ingenuity and labor in the production of his device without illegal competition by production of a similar device by the defendants is the same whether the invasion of the right is claimed to be in violation of the federal patent law or of the nonfederal law of unfair competition", the claims being deemed "related" to that extent. The variance in proof was not considered sufficient to raise any serious constitutional doubts of the power of Congress to authorize the courts to handle both causes of action together.

Crimes . . . bail . . . statutory authority to suspend sentence and place on probation does not authorize court to suspend sentence on convicted's own recognizance.

■ *Ziegler v. District of Columbia*, Mun. Ct. App., D.C., February 16, 1950, Hood, A.J.

Appellant was convicted of violation of a traffic ordinance, sentence being suspended on appellant's promise not to repeat the offense. The Government moved to dismiss the appeal on the ground that no valid and appealable sentence had been imposed, since the trial court lacked statutory authority to suspend sentence. This motion was denied, although the Court agreed that the trial court lacked authority to suspend, and accordingly vacated the order suspending sentence and remanded the case to give the trial court an opportunity to reconsider the sentence.

The Court noted that District of Columbia courts had long followed the practice of suspending sentence on personal bond in appropriate cases, but deemed the controlling issue the extent of statutory authority, in view of *Ex parte United States*, 242 U. S. 27, cited for the proposition that the federal courts lack inherent authority to suspend sentence. No adequate statutory authority was found for the district courts, the in-

stant suspension not being within the District of Columbia Probation Act, which authorizes suspension of sentence where the convicted is placed on probation. (The situation as to other federal courts was said to be governed by the Federal Probation Act.)

Nevertheless, the Court deemed the judgment appealable. Since the trial court had power to impose the sentence, the void suspension did not, in the Court's opinion, void the sentence.

Evidence . . . wire tapping . . . evidence that first information which set federal agents on trail of accused who was alleged to have subsequently committed crime came from confidential informant who was a wiretapper held inadmissible on the question of validity of indictment in federal criminal case since, even if true, it would not give accused immunity from prosecution for subsequently committed crimes.

■ *U. S. v. Coplon and Gubitchev*, U.S. D.C., S.D.N.Y., January 20, 1950, Ryan, D.J.

In a federal criminal action charging defendants with conspiring to commit espionage in violation of 18 USC §§ 793, 794 and 2071, the Court ruled that defendants' motion to dismiss the indictment on the ground that their telephone conversations were intercepted by federal agents should be denied where the indictment was not based on evidence of the conversations and where it was shown that information that was obtained by the interceptions, and which enabled the government agents to obtain evidence, was obtained also from other sources independent of what was learned by the interceptions. The Court maintained that evidence that a confidential informant who first set agents of the Federal Bureau of Investigation on the trail of the accused had obtained his information by wiretapping was not admissible since such fact, even if true, would not give the accused immunity from prosecution for subsequently committed crimes. Plans and details of proposed crim-

inal ventures which are overheard by law enforcement officers, the Court stated, "may not be carried out and perfected with impunity, for no license or privilege to commit crime is conferred on wrongdoers by reason of the fact that the wires over which they talk are unlawfully tapped by agents." In excluding evidence tending to show the identity of the confidential informant and the fact that he was a wiretapper, the Court stated that its purpose was to prevent unnecessary probing into the confidential sources of information of the FBI. It noted in this regard that the Government need not disclose the identity of informers unless it appears that disclosure is necessary or desirable to show defendant's innocence, *United States v. Li Fat Tong*, 152 F. (2d) 650 (C.A. 2d, 1945).

[Defendants were thereafter tried and, on March 7, 1950, convicted.]

Municipal Corporations . . . zoning . . . ordinance requiring two-acre plots for residential building purposes held valid.

■ *Dilliard v. Village of North Hills*, N. Y. Supreme Ct., App. Div., 2d Dept., February 14, 1950, memorandum decision.

Reversing the decision of the court below (see review in 35 A.B.A.J. 1020, December, 1949), the Court upheld the legality of a zoning ordinance adopted by the board of trustees of defendant village requiring two-acre plots for residential building purposes. It was found below that the average residential plots in the village, which encompassed some 1500 acres in area, averaged fifty acres. The Court ruled that "in the light of the location and character of the village, it was within defendant's legislative province to determine, in the absence of proof of superior public need, that the two-acre restriction is justifiable as an elastic application of police power."

Labor Law . . . refusal to bargain . . . NLRB held entitled to temporary injunction restraining United Mine Workers from insisting in negotiations with coal operators that new contract contain provisions in violation of

Labor Management Relations Act.

■ *Pennello v. International Union, United Mine Workers of America, et al.*, U.S.D.C., D.C., February 9, 1950, Keech, J.

Acting under § 10 (j) of the Labor Management Relations Act, the United States District Court for the District of Columbia granted the Regional Director of the National Labor Relations Board a temporary injunction restraining the United Mine Workers of America from engaging in unfair labor practices, in violation of §§ 8 (b) (2) and 8 (b) (3) of the Labor Management Relations Act, by demanding in negotiations with coal operators that a new contract contain a closed-shop clause without union compliance with the statutory requirements prerequisite to execution of closed-shop agreements, by insisting that the contract contain so-called "able and willing" and "memorial period" clauses, by insisting that provision be made for administration of a welfare and retirement fund so as to limit its benefits to union members, and by refusing to accede to the request of the Southern Coal Producers Association for further bargaining conferences.

Dealing at length with the "able and willing" and "memorial period" clauses, the Court stated that they were designed and intended to permit the union unilaterally to abrogate or suspend the operation of the wage contract at any time, to determine the periods when union members should work, or to fix the terms and conditions of employment as respondents saw fit. In effect, it was said, these clauses would allow the union to control production and ultimately, through such control, at least indirectly, to fix prices. The union's insistence upon the inclusion of such "extraneous and unlawful" provisions was deemed a refusal to confer in good faith, which was an essential element of collective bargaining under § 8(d) of the Act. The Court pointed out that there was not involved the question of individual workers seeking to avail themselves of their constitutional

right to be free to work when they desire, but the question of the right without limitation of a union and its representatives to order its members collectively to refrain from work and paralyze an industry vital to the nation's economy. If the operators, through concerted action, agreed to such clauses with knowledge of what use would be made of them, the Court felt that the question might well arise whether the operators had not subjected themselves to prosecution under the antitrust laws.

(On February 11, 1950, Keech, J., issued a temporary order restraining respondents from continuing, permitting or encouraging the strike then in existence in the bituminous coal mines covered by the national bituminous coal wage agreement of 1948. The order was to expire on February 21, 1950, but was on February 20 extended to March 3, 1950.)

On February 20, Keech, J., issued an order directing that the United Mine Workers appear before the Court on February 24 to show cause why it should not be punished for civil and criminal contempt of court in failing to obey the injunction of February 11. On that date the union was ordered to stand trial February 27 on contempt charges. Judge Keech ruled on March 2 that, despite the failure of the union's members to cease the strike and to obey the union's back-to-work order, the evidence before the Court was insufficient to support a finding that the union was guilty of either criminal or civil contempt. He noted that the Government had failed to prove that the union "knowingly, wilfully, wrongfully, and deliberately disobeyed and violated" the temporary restraining order of February 11.

Patents . . . applications . . . Patent Office may not strike out patent application of former employee of Patent Office where filed after his resignation but based on idea for invention conceived during his tenure of office.
■ Marzall, Commissioner of Patents v. Fox, C.A., D.C., February 6, 1950, per curiam.

The Court ruled in this action

that the prohibition in 35 USC § 4 against Patent Office employees acquiring or taking during the period of their employment "any right or interest in any patent issued by the office" did not authorize the Commissioner of Patents to strike from the files a former Patent Office employee's patent application, filed after his resignation but based on an idea for the invention conceived during his tenure of office, in the absence of any "suggestion" that he had appropriated any materials available to him in the Patent Office. In affirming the judgment below requiring the restoration of plaintiff's application to the files, the Court adopted the opinion of the lower court that plaintiff's interest was clearly in an "invention" as distinguished from a "patent", despite the fact that he drew up his application prior to his removal from the Patent Office. Reference was also made to the observation of the lower court that it was "not unmindful of the potential danger involved" in allowing Patent Office employees to resign and immediately thereafter to file an application for a patent. The question, however, as to whether there should be an express statutory restriction establishing the time which should elapse before ex-employees of the Patent Office might apply for patents was deemed a matter for congressional consideration.

Patents . . . government employees . . . uniform patent policy established for Government with respect to inventions made by government employees.

■ Executive Order 10096, January 23, 1950 (15 Fed. Reg. 389).

Publication was made in the *Federal Register* of January 25, 1950, of Executive Order 10096 establishing a uniform patent policy for the Government with respect to inventions thereafter made by government employees. The Atomic Energy Commission is excluded from the provisions of the Order.

It is provided that the Government shall obtain the entire right, title and interest in and to all inventions made

by a government employee (1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other government employees on official duty, or (3) that bear a direct relation to or are made in consequence of the official duties of the inventor. Where the contribution of the Government is insufficient equitably to justify a requirement of assignment to the Government of the entire right, title and interest to the invention, the government agency concerned, subject to the approval of the chairman of the Government Patents Board, shall leave title to the invention in the employee, subject to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license.

In the application of these provisions to any particular invention, inventions of employees of certain enumerated classes are presumed to be subject to the Government's right to obtain the entire right, title and interest while inventions of all other employees are presumed to be subject to the reservation by the Government of a nonexclusive, irrevocable, royalty-free license. The presumptions may be rebutted and do not preclude a determination that the Government should leave the entire right, title and interest in and to the invention in the government employee, subject to law.

A government Patents Board is established consisting of a chairman to be appointed by the President, and one representative from the Department of Agriculture, Department of Commerce, Department of the Interior, Department of Justice, Department of State, Department of Defense, Civil Service Commission, Federal Security Agency, National Advisory Committee for Aeronautics, and the General Services Administration. The Order sets forth the functions of the Board and the various duties of its chairman.

United States . . . Federal Tort Claims Act . . . injured policeman of District of Columbia entitled to benefits from

District Police and Firemen's Relief Fund, which was authorized and partially supported by the Federal Government, is not thereby precluded from suing under Act where injuries were caused by federal employee.

■ *Wham v. U. S.*, C.A., D.C., January 30, 1950, Proctor, C.J.

The question presented was whether plaintiff, a member of the Metropolitan Police Force of the District of Columbia, had a right of action for damages against the United States under the Federal Tort Claims Act based upon injuries sustained while on duty as the result of the negligence of a Treasury Department employee in the operation of one of its automobiles. Summary judgment was granted the United States by the lower court on the ground that plaintiff was entitled to draw compensation from the District Police and Firemen's Relief Fund, which was authorized and partially supported by the Federal Government to the extent of 40 per cent of its cost, and hence was precluded from suing the Government under the Act.

Reversing the judgment below, the Court on appeal upheld plaintiff's right to sue under the Act and ruled that the United States bore no such direct relationship to the District of Columbia relief fund as to justify the Government's claim for exemption from liability under the Tort Claims Act. It was pointed out that the Government's 40 per cent apportionment to the fund had "long since" given way to lesser annual lump sum appropriations. Despite the fact that the fund was authorized by Congress in its role as the law-making body for the District, and that "some monies" from federal sources filtered into the fund, the Court maintained that "neither in form nor substance, name nor character, could it be regarded as a fund of the United States". Moreover, it was stated, Congressional appropriations to the District of Columbia municipal government were not gifts but were in compensation for valuable benefits received by the Federal Government from the municipality

and that the respondent erred in failing to distinguish between the federal and municipal governments and their employees.

In further support of its position, the Court considered itself governed by the decision in *Brooks v. United States*, 337 U. S. 49 (1949), in which claimant soldiers on furlough were not deemed to be excluded by the Tort Claims Act by reason of the Government's system of benefits for soldiers and their dependents. The instant Court could find no reason for "discriminating" so as to exclude a non-federally-employed policeman. In rejecting the contention that the doctrine of election between inconsistent remedies applied in this case, the Court maintained that plaintiff's injuries gave rise to separate and distinct claims—one as a policeman against the District and another as an individual against the United States.

Further Proceedings in Cases Reported in this Division

■ The following action has been taken in the United States Supreme Court:

AFFIRMED, February 6, 1950: *Regents of the University System of Georgia v. Carroll et al.*—Licenses (35 A.B.A.J. 64, 1022; January, December, 1949).

AFFIRMED, February 20, 1950: *District of Columbia v. Little*—Constitutional Law (35 A.B.A.J. 849; October, 1949; 36 A.B.A.J. 61; January, 1950).

REVERSED, February 6, 1950. *U. S. v. Morton Salt Co.*—Commerce (33 A.B.A.J. 822; August, 1947; 34 A.B.A.J. 241, 609; March, July, 1948; 35 A.B.A.J. 1022; December, 1949); *State Airlines, Inc. v. Civil Aeronautics Board, Piedmont Aviation, Inc., Intervenor*—Administrative Law (35 A.B.A.J. 498, 1022; June, December, 1949) brought up on separate petitions of Civil Aeronautics Board and Piedmont Aviation, Inc.

REVERSED, February 20, 1950: *Wong Yang Sung v. McGrath*—Administrative Law (34 A.B.A.J. 946; October, 1948).

WRIT OF CERTIORARI DISMISSED, February 6, 1950: *State Airlines, Inc.*

v. Civil Aeronautics Board, Piedmont Aviation, Inc., Intervenor—Administrative Law (35 A.B.A.J. 498, 1022; June, December, 1949) brought up on petition of State Airlines, Inc.

CERTIORARI DENIED, February 6, 1950: *Urbuteit v. U. S.*—Drugs and Druggists (34 A.B.A.J. 63, 508; January, June, 1948; 35 A.B.A.J. 66, 503; January, June, 1949).

CERTIORARI DENIED, February 13, 1950: *National Maritime Union of America v. NLRB*—Labor Law (34 A.B.A.J. 948, October, 1948; 35 A.B.A.J. 777, September, 1949).

■ The following action has been taken by the Court of Appeals of Maryland:

REVERSED, February 9, 1950: *Hammond, Attorney General of Maryland et al. v. Lancaster et al.*—Constitutional Law (35 A.B.A.J. 850, October, 1949; see review *supra*).

■ The following action has been taken by the New York Supreme Court, Appellate Division, Second Department (see review *supra*):

REVERSED, February 14, 1950: *Dilliard v. Village of North Hills—Municipal Corporations* (35 A.B.A.J. 1020; December, 1949).

■ The following action has been taken by the United States Court of Appeals for the District of Columbia:

AFFIRMED ON OPINION BELOW, February 20, 1950: *The Charter Oak Fire Insurance Co. v. Gerrity*—Insurance (35 A.B.A.J. 422, May, 1949).

■ Reversing a judgment of the United States District Court for the Northern District of Illinois and remanding for further proceedings, the United States Court of Appeals for the Seventh Circuit, on January 27, 1950, ruled that an institution which was commonly known as a hotel in its community and provided customary hotel services was decontrolled by § 202(c) (1) of the Housing and Rent Act of 1947, even though it had no transient guests or accommodations for transients on the effective date of the Act, and that the trial court should have admitted evidence as to the common characterization in the community: *Adler et al. v. Northern Hotel Co. et al.*—War (35 A.B.A.J. 678; August, 1949).

Nominating Petitions

Alabama

The undersigned hereby nominate William Logan Martin of Birmingham for the office of State Delegate for and from Alabama for a three-year term beginning with the adjournment of the 1950 Annual Meeting:

L. J. Tyner and Jacob A. Walker of Opelika;

W. H. Albritton and Edward F. Reid of Andalusia;

Cecil H. Young, Hugh D. Merrill and R. E. Jones of Anniston;

Lloyd G. Bowers, Wm. Alfred Rose, White E. Gibson, Irvine C. Porter and Ormond Somerville of Birmingham;

W. H. Mitchell and H. A. Bradshaw of Florence;

C. L. Watts and Chas. E. Shaver of Huntsville;

T. Julian Skinner, Jr., and Herman W. Maddox of Jasper;

Jack C. Gallalee, Thomas A. Johnston III, J. N. Ogden, Y. D. Lott, Jr., and Francis H. Inge of Mobile;

Fred S. Ball, Jr., and Henry C. Meader of Montgomery.

California

The undersigned hereby nominate R. E. H. Julien of San Francisco for the office of State Delegate for and from California to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Wallace E. Hyde, Allen G. Wright, Valentine Brookes, Vincent H. O'Donnell, Everett S. Layman, Theodore M. Monell, Robert E. Wickersham, Randell Larson, Roger J. Traynor, A. Donham Owen, Donovan O. Peters, Arthur H. Kent, Gunther R. Detert, Wallace E. Sedgwick, James Farraher, Fred L. Dreher, J. L. McNab, Samuel Taylor, Duncan Low, Ivore R. Dains, John A. Sutro, Maurice D. L. Fuller, Eugene D. Bennett, George Herrington and Richard P. Norton of San Francisco.

Florida

The undersigned hereby nominate Robert R. Milam of Jacksonville for the office of State Delegate for and from Florida to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

William A. Lane, Herbert U. Feibelman, John M. Murrell, Leo S. Julian, M. L. Mershon, O. B. Simmons, Jr., Herbert S. Sawyer, Robert H. Anderson and Paul R. Scott of Miami;

Scott M. Loftin, Giles J. Patterson, Eugene C. Mitchell and Warren L. Jones of Jacksonville;

E. H. Drew and George W. Coleman of West Palm Beach;

J. Lance Lazonby and Edwin A. Clayton of Gainesville;

William S. Fielding and Victor O. Wehle of St. Petersburg;

John M. Allison, Chester H. Ferguson and Cody Fowler of Tampa;

J. Velma Keen of Tallahassee;

H. M. Voorhis of Orlando;

E. Dixie Beggs of Pensacola.

Kansas

The undersigned hereby nominate J. B. Patterson of Wichita for the office of State Delegate for and from Kansas to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

A. W. Hershberger, Richard Jones, William P. Thompson, William F. Pielsticker, Claude E. Sowers, Mark H. Adams, Garner E. Shriver, P. K. Smith, Lloyd F. Cooper, Richard Mullins and George B. Collins of Wichita;

Walter T. Chaney, Tom Lillard, O. B. Eidson, Herbert A. Marshall, Allen Meyers, Clayton M. Davis, A. Harry Crane, Ward D. Martin, Phil H. Lewis, Lawrence J. Richardson and Robert L. Webb of Topeka;

LaRue Royce, E. S. Hampton and Arthur B. Dillingham of Salina.

Kentucky

The undersigned hereby nominate Blakey Helm of Louisville, for the office of State Delegate for and from Kentucky to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Allen P. Dodd, Jr., Allen P. Dodd, Sr., Edward A. Dodd, Albert F. Reutlinger, Robert L. Page, Lawrence S. Grauman, Samuel M. Rosenstein, Wallis Downing, Charles W. Morris, Frank A. Garlove, James U. Smith, Jr., Oldham Clarke, Chester L. Rigsby, R. Lee Blackwell, L. Frank Withers, Leo T. Wolford, Robert E. Hatton, David R. Castleman, A. Shelby Winstead, Henry E. McElwain, Jr., James W. Stites, Marshall P. Eldred, John T. E. Stites and Henry J. Stites of Louisville;

M. C. Redwine of Winchester.

Massachusetts

The undersigned hereby nominate Allan H. W. Higgins of Boston for the office of State Delegate for and from Massachusetts to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Frank W. Grinnell, Reginald Heber Smith, Lawrence E. Green and J. N. Welch of Boston;

John M. Maguire, Austin W. Scott, Edmund M. Morgan, Zechariah Chafee, Jr., Lon L. Fuller, Erwin N. Griswold, Livingston Hall, Samuel Williston, Warren A. Seavey, and Ernest J. Brown of Cambridge;

Richard H. Field of Weston;

Dudley H. Dorr of Lancaster;

Irene Gowetz, Frank C. Smith, Jr., J. Otis Sibley, Paris Fletcher, Bradley B. Gilman, Merrill S. June, George H. Mirick, Paul Revere O'Connell and Alexander B. Campbell of Worcester.

Missouri

The undersigned hereby nominate Samuel H. Liberman of St. Louis for the office of State Delegate for and from Missouri to be elected in 1950 for a three-year term beginning at

Nominating Petitions

the adjournment of the 1950 Annual Meeting:

Roscoe P. Conkling, S. P. Dalton, Lue C. Lozier and James A. Potter of Jefferson City;

Terence M. O'Brien, Paul G. Koontz, Daniel V. Howell, William E. Kemp, Elliot Norquist, Clif Langsdale, John H. Lathrop and Charles L. Carr of Kansas City;

J. M. Lashly, James M. Douglas, Russell L. Dearmont, Fred J. Hoffmeister, Roscoe Anderson, Clem F. Storckman, George L. Stemmler, James C. Wilson, Harry Gershenson, Claude W. McElwee, Irene L. Dulin, William J. Blesse and Kenneth Teasdale of St. Louis.

North Carolina

■ The undersigned hereby nominate C. Richard Wharton of Greensboro for the office of State Delegate for and from North Carolina to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Francis J. Heazel, J. M. Horner, Kester Walton, Robert R. Williams, Jr., and R. R. Williams of Asheville;

C. W. Tillett, Wm. T. Covington, Jr., Charles W. Bundy and Paul C. Whitlock of Charlotte;

C. Clifford Frazier, Robert H. Frazier, J. A. Cannon, Jr., Welch Oliver Jordan, Charles A. Hines, Kenneth M. Brim and Adam Younce of Greensboro;

Wm. M. Allen of Elkin;

Horace S. Haworth of High Point;

Louis J. Poisson and Wm. B. Campbell of Wilmington;

Fred S. Hutchins, Wm. F. Womble, Irving E. Carlyle, G. H. Hastings and Philip E. Lucas of Winston-Salem.

Pennsylvania

■ The undersigned hereby nominate David F. Maxwell of Philadelphia for the office of State Delegate for and from Pennsylvania to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

John McL. Smith, William H. Neely and F. Brewster Wickersham of Harrisburg;

Eugene D. Siegrist and C. M. Seltzer of Lebanon;

Robert B. Brunner and Desmond J. McTighe of Norristown;

William Clarke Mason, A. Carson Simpson, Vincent P. McDevitt, Joseph W. Henderson, Robert T. McCracken, Robert Dechert, Henry S. Drinker, Charles I. Thompson, Morris Wolf, William A. Schnader, M. B. Saul, Leon J. Obermayer, Leighton P. Stradley, and Ernest Scott of Philadelphia;

John G. Buchanan, William H. Eckert, Charles E. Kenworthy and G. Dixon Shrum of Pittsburgh.

Tennessee

■ The undersigned hereby nominate Walter Chandler of Memphis for the office of State Delegate for and from Tennessee to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Charles G. Morgan, Alfred B. Pittman, Cooper Turner, Jr., Thomas R.

Price, Earl Hagler, Frank M. Gilliland, Edward P. Russell, Edward J. Lawler, Jr., Vance J. Alexander, Jr., Allen Cox, Jr., W. F. Murrah, Harry P. Rubert, Lovick P. Miles, Jr., James W. Wrape, Roane Waring, Lovick P. Miles, A. Longstreet Heiskell, H. W. Laughlin, Jr., J. H. Shepherd, Ernest Williams, Edward W. Kuhn, Albert C. Rickey, Lewis R. Donelson III, Sam A. Myar, Jr., and W. Stuart McCloy of Memphis.

Virginia

■ The undersigned hereby nominate Henry P. Thomas of Alexandria for the office of State Delegate for and from Virginia to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

L. H. Shrader of Amherst;

V. Floyd Williams, Denis R. Ayres, Earl F. Wagner, William S. Banks, Thomas R. Dyson, Richard W. Barton and Alice C. Poling of Alexandria;

Edmund D. Campbell, William C. Nemeth, Francis W. Wayland and Thomas Gilmer of Arlington;

Robert Button of Culpeper;

Homan W. Walsh, Junius R. Fishburne and Thomas J. Michie of Charlottesville;

Carter Glass III, and S. Bolling Hobbs of Lynchburg;

Henry J. Lankford and J. Davis Reed, Jr., of Norfolk;

Wilbur C. Hall of Leesburg;

J. B. Allman of Rocky Mount;

C. G. Quesenberg and Louis F. Jordan of Waynesboro;

H. K. Benham of Winchester.

"Books for Lawyers"

(Continued from page 288)

to such fantastic lengths to keep his private life his very own business. His task it is, and he carries it off with skill and conviction, to remind us of the uniquely inadequate state of our knowledge about the essential facts of Burke's activities, friendships, enmities, finances, family relationships—indeed, of almost everything that is important to know of a great man whose place in history we are anxious to fix. To this end he pre-

sents six essays on various areas of uncertainty or ignorance in the present understanding of Burke (for example, the essential inadequacy of "Boswell's Portrait of Burke" and the unexplained relations of "Burke, Paine, and Jefferson") that are brilliant examples of literary craftsmanship and antiquarian scholarship. They are something else as well. They are pretty trustworthy indications that Professor Copeland, if he is willing to give twenty years and some part of his eyesight to the task, is the man to write the literary biog-

raphy of Burke. And if he is prepared to give another ten to the trade of political historian, there is no reason why he should not become the greatest of the biographers of a very great man.

These two books, although one has too much and the other too little ideology, are substantial contributions to a field in which the most important contributions are yet to be made.

CLINTON L. ROSSITER

Cornell University
Ithaca, New York

Department of Legislation

Harry W. Jones, Editor-in-Charge

Some Causes of Uncertainty In Statutes

■ Every lawyer who holds himself out as a legislative draftsman dreams of one perfect job. Let the painter aspire to his one flawlessly balanced composition, the composer to his one consummate harmony, and the big league pitcher to that one crowning game at which no opposing batter will reach first base. The draftsman of bills will be ready to pronounce his *nunc dimittis* the day he sees enacted into law a statute of his devising that leaves no contingency unprovided for and that is clear and unambiguous in its direction as to each and every conceivable fact situation which may take place in the world of affairs.

Unhappily, the gap between aspiration and accomplishment stretches as wide in legislative craftsmanship as in any other professional field. The draftsman can narrow the area of statutory uncertainty by painstaking fact-gathering and intensive study of every facet of existing case and statute law bearing on the matter at hand. He can reduce the incidence of statutory ambiguity by conjuring up hundreds of hypothetical fact-situations which may arise in the future for decision under the statute. But, when the job is done and the bill added to the statute books, there will still be cases for which the statute affords no certain guide. It is the purpose of this sketch to suggest a few of the reasons why any statute, however carefully and imaginatively drawn up, must fall short of the goal of perfect certainty.

Words Are Imperfect Symbols To Communicate Intent

Certain of the draftsman's difficulties are not unique to legislative work but arise in connection with the

preparation of all legal documents. The draftsman must express his understanding and purpose in words, and words are notoriously imperfect symbols for the communication of ideas. Justice Cardozo was speaking for our entire word-bound profession when he began his little classic, *The Paradoxes of Legal Science*, with the mournful exclamation, "They do things better with logarithms." What makes the legislative draftsman's job more trying than the task of the draftsman of a contract or a will is that the words of the statute must communicate the intention to at least three crucial classes of readers; the legislators who are to examine the bill to decide whether it is in accordance with their specifications, the lawyers who must make use of the statute in counseling and litigation, and the judges who will give the statute its final and authoritative interpretation. One does not have to be an expert in semantics to know that words rarely mean the same thing to all men or at all times. An intent that seems "plainly" expressed to the legislative experts on a standing committee may be ambiguous to affected persons and their lawyers and quite unintelligible to judges with no special knowledge or experience in the field of regulation.

Unforeseen Situations Are Inevitable

Unforeseen cases account for the great majority of the instances of statutory uncertainty. The problem here is that the typical drive for legislative action originates not in a desire for an over-all codification of the law but in some felt necessity for a better way of dealing with some specific situation or group of situa-

tions. The draftsman must make effective provision for the specific needs which are urged upon him, but he must write the statute in the form of a proposition of general applicability. In our legal system we have a long-standing distrust of legislation so narrowly drawn as to affect only designated persons or a few particularized situations. Inequality in the application of legislation is the evil aimed at in such provisions of the Federal Constitution as the Equal Protection and Bill of Attainder Clauses, and the same general idea is reflected in the provision of most state constitutions against local and special legislation. The policy is sound, beyond any question at all, but it leaves to the draftsman of statutes the hard task of formulating a general rule that adequately takes care of the specific situations before the legislature without including in its apparent scope unthought-of cases somewhat similar in fact content but distinguishable on policy grounds.

Case-minded judges and lawyers might be a little less caustic in their comments on the ambiguity of statutes if they were to reflect that the problem of uncertainty in relation to the unthought-of case arises also in the use of case precedents. Every first year law student learns that he must distinguish between the *holding* of a case and the *dicta* which may be set out in the court's opinion. In our common law tradition, we take as binding precedent only the decision of the court on the material facts of the case actually before it. All else we disregard as *dictum*—persuasive, perhaps, but not authoritative. This immemorial common law distinction between *holding* and *dictum* is based on a recognition that even the finest judge is at his best only when dealing with the facts of the case at hand, the issues on which he has had the benefit of argument of counsel. The same is true of the statute-law maker and his technical drafting assistants. If the draftsman is respectably skilled and careful, he will make unmistakably clear provision for the specific

situations called to his attention at committee hearings and in other ways. If he is at all imaginative, he will anticipate and take care of other situations within the reach of reasonable anticipation. But human foresight is limited and the variety of fact-situations endless. Every generally worded statute, sooner or later, will fail to provide a certain direction as to the handling of those inevitable legislative nuisances, the cases nobody thought of.

Uncertainties May Be Added in Cause of Enactment

So far in this sketch, the problems of the legislative draftsman have been considered without reference to the political realities of the legislative process in Congress and the state legislatures. But legislative drafting is not a branch of art for

art's sake. After the statute has been drafted it has to be passed, and there are many stages in the process of enactment at which uncertainty may be introduced into the most tightly drafted legislative proposal. The sponsoring legislator or the responsible standing committee is likely to make changes in the bill without having the time to consider the effect of the changes on the articulation of the bill as a whole. An amendment from the floor may add confused or inconsistent provisions which fit awkwardly into the statutory pattern. It sometimes becomes necessary as a matter of political compromise to eliminate some precise key-word in the bill and substitute for it some less exact term, chosen deliberately to leave a controversial issue to the courts for decision. In short, it is wholly unrealistic to read a statute

as if it were the product of wholly scientific, detached and uneventful deliberation.

A few days ago, I heard a group of lawyers and businessmen denouncing the "wretched drafting" embodied in a statute of great current significance. I happened to know in this instance that the act under fire was written by one of the ablest legislative draftsmen in the country. Every problem mentioned here existed in relation to that statute—the inexactness of words, the unpredictable range of future fact-situations, and the rough-and-tumble of the practical legislative process. There are times in legislative work when one finds it an irresistible temptation to reply, in the terms of the old maxim: "Don't shoot the pianist. He's doing the best he can."

Practising lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyier • Editor-in-Charge

BUSINESS ASSOCIATIONS—*"Buy and Sell Agreements With Respect to Corporate and Partnership Interests"*: In the January issue of the *Wisconsin Law Review* (Vol. 1950, No. 1; pages 12-27), George R. Currie presents an article that cannot help but be of aid to the practitioner faced with the problem of drafting an agreement for the purchase of the interest of a stockholder in a closed corporation, or of the interest of a partner, effective upon the death of the stockholder or partner. The author discusses the various factors that must be considered in order to avoid the numerous pitfalls which can beset an inadequately-drafted agreement or an improperly-administered purchase plan. Tax consideration and the use of insurance are surveyed, in addition to the more specific aspects of such a buy and sell agreement—

such as fixing the purchase price to be paid, use of trustee or escrow holder, and determining how and when the sales price is to be paid. In addition, the author sets out a synopsis of an agreement drafted for two partners who own equal interests in the partnership. This serves as a convenient and useful guide for the drafting of any buy and sell agreement of the type under consideration. (Address: Wisconsin Law Review, Law School of the University of Wisconsin, Madison, Wis.; price for a single copy: 75 cents.)

CREDITORS' RIGHTS—*"Transfers in Fraud of Creditors"*: In the January issue of the *Commercial Law Journal* (Vol. 55, No. 2; pages 5-11), B. Bernard Wolson gives a succinct, well-documented discussion of the common law on the provisions of

the Uniform Fraudulent Conveyance Act. The author discusses separately the various constituent elements of a fraudulent transfer, and then takes up briefly the remedies available to creditors once it is determined that a fraudulent transfer has taken place. Excellent as a quick-reference "starter" for research in this field. (Address: Commercial Law Journal, 11 West Monroe Street, Chicago 3, Ill.; price for a single copy: 25 cents.)

LABOR LAW—*"Regulation of Collective Bargaining by the National Labor Relations Board"*: In this article in the January issue of the *Harvard Law Review* (Vol. 63, No. 3; pages 389-432), Professors Archibald Cox and John T. Dunlop criticize the increased tendency toward government regulation of both the processes of collective bargaining and the terms of collective agreements. The authors admit that perhaps the weight of present authority is to the effect that the National Labor Relations Board can decide that the employer, in order to be bargaining collectively, must bargain with respect to matters (e.g., pensions, merit increases) other than those (viz., wages, hours, seniority and grievance procedure) that have traditionally been

presented over the bargaining table. However, they urge that it is the essence of collective bargaining that the employer be able to obtain, as his part of the bargain and by mutual agreement, the right that certain questions be left exclusively to his unilateral determination. It is emphasized that this position is consistent with the purposes of the Wagner Act and preserves what the authors consider the critical distinction between (1) the employer taking unilateral action without consulting the bargaining representative on matters concerning which it may wish to bargain, and (2) the employer negotiating in good faith for the union's agreement to a contract provision granting management the power to act unilaterally in defined areas. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: \$1.00.)

LABOR LAW—"The Fair Labor Standards Amendments of 1949": In the February issue of the *George Washington Law Review* (Vol. 18, No. 2; pages 127-159), Raymond S. Smethurst and Reuben S. Haslam, present an article that is of value as a general reference for both the judicial and legislative background of the recent amendments to the federal minimum wage law. The discussion is arranged according to the problems of general importance that are affected by the amendments and which, in the authors' opinion, may well present real problems of statutory construction: jurisdiction, or "coverage"; exemptions; overtime hours and "regular rate" of pay; and, administration and enforcement. (Address: The George Washington Law Review, The George Washington University, Washington, D. C.; price for a single copy: \$1.00.)

NEGOTIABLE INSTRUMENTS—"Negotiable Instruments Under the Uniform Code": In the January issue of the *Michigan Law Review* (Vol. 48, No. 3; pages 255-

310), George E. Palmer writes another of the numerous articles covering various phases of the new Uniform Commercial Code, the ambitious joint undertaking of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Article III of the Code, "Negotiable Instruments" (including a division on bank collection), is the subject of the present article. The author discusses only those sections of the proposed statute that concern the more fundamental legal aspects of negotiable instruments or which work deliberate changes in existing law. Even so, the article contains a considerable volume of material; any attempt to do more than the highlights would necessitate a treatise. At such time as a few of the states have adopted this section of the Uniform Commercial Code, articles such as the present one will be of direct significance—along with the extensive notes and comments of the draftsmen—in the development of the law under the new legislation. Until such time, they furnish a useful backdrop for the consideration of questions arising under present law. (Address: Michigan Law Review, University of Michigan Law School, Ann Arbor, Michigan; price for a single copy: \$1.00.)

PROCEDURE—"Solicitation as Doing Business—A Review of New York and Federal Cases": In the November issue of the *Fordham Law Review* (Vol. 8, No. 2; pages 204-220), Frederick B. Lacey discusses the activities of "drummers" as providing a basis for subjecting foreign corporations to personal service of process within the state of solicitation. The author concludes that the recent case of *International Shoe Company v. Washington*, 326 U. S. 310 (1945), has almost completely laid the ghost of the former rule that "mere solicitation" does not constitute "doing business" for purposes of using corporate presence as a basis for personal jurisdiction, *Green v. Chicago, B. & Q. Ry.*, 205 U. S. 530 (1907). The *Green* case remains,

however, as a "polar" decision to be kept in reserve for use in those future cases where mere solicitation as a reason for jurisdiction results in basic "unfairness." A review of the New York cases leads the author to state that the New York courts will go as far as they can constitutionally go in sustaining jurisdiction because of solicitation activities. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: \$1.00.)

TAXATION—"The Responsibilities of the Tax Adviser": In the January issue of the *Harvard Law Review* (Vol. 63, No. 3; pages 377-388), Randolph E. Paul, describes the dual responsibilities of the tax practitioner—his responsibility to his clients and his responsibility to his government. The author emphasizes the complexity of the tax adviser's task of "systematized prediction"—(a) knowledge of voluminous tax materials as well as many other fields of law so often woven into the tax law, and (b) an emphasis on underlying substance and reality rather than on the lawyer's traditional tools of form and technicality. After discussing the tax adviser's particular responsibilities to his clients, Mr. Paul concludes with a discussion of his responsibilities as a citizen who is especially qualified to aid in the determination of proper tax policy. He criticizes the tendency of most tax advisers to write only literature favorable to taxpayers and at the same time to remain mute about the flagrant loopholes in present tax law. Mr. Paul concludes that the tax lawyer, in order to hold tax business, need not necessarily voice only those opinions which will be popular with taxpayers, and that the "surrender" need not be unconditional. Indeed, there are many tax advisers who successfully manage the double job of ably representing their clients in particular cases and faithfully working for the tax system taxpayers deserve. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: \$1.00.)

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Stock Dividends

■ Sometimes it has seemed as though little new could be said about the taxation of stock dividends, for the problems they raise have received the frequent consideration of Congress, the courts and commentators. Nevertheless, the recent Tax Court decision in *Edwin L. Wiegand*, 14 T.C. No. 18, promulgated January 31, 1950, shows that important law still can be made in this field and that agreement on basic principles has not yet been achieved.

In the *Wiegand* case, the company had an authorized capital stock of 6,000 shares of Class A common stock, \$100 par value, and 36,000 shares of Class B common stock, no par value but with a stated value of \$5 per share. Only 4,000 shares of Class A stock and 24,000 shares of Class B common had been issued and were outstanding at the time of the stock dividend. In 1940, the company issued the remaining unissued shares as a stock dividend by distributing to Class A stockholders one half share of Class A stock for each share held and to Class B stockholders one half share of Class B stock for each share held. To reflect the stock distributions, the company transferred from surplus to its capital account \$260,000 for the new Class A and Class B shares.

The Class A common had sole voting rights. The Class A common was also entitled to cumulative \$6 annual dividends per share before any dividends could be paid on Class B stock; thereafter, the Class B stock was entitled to receive \$2 per share,

with further dividends payable equally to each class on a per share basis. On liquidation, the Class A stock was entitled to \$100 per share plus accrued dividends before payment of any amounts to holders of Class B stock; thereafter, the Class B stock was entitled to \$5 per share, with further distributions to be made between the Class A and Class B stock in the proportion which the stated capital of each class bore to the total stated capital.

Some of the stockholders held identical proportions of the total Class A stock and Class B stock. Two stockholders held proportionately more Class A stock than Class B stock, principally for the reason that they had given amounts of their Class B stock to family trusts and to a spouse.

A majority of the Tax Court held that the distributions as dividends of Class A and Class B stock constituted taxable income. Judge Turner, writing for the majority, stated that this situation was novel. The Supreme Court had decided that a stock dividend was not income where only one class of stock was outstanding, and a distribution is made in stock of the same class. *Eisner v. Macomber*, 252 U. S. 189; *Helvering v. Griffiths*, 318 U. S. 371, but that a stock dividend is income where two classes of stock are outstanding and a dividend is paid on one class of stock in the form of shares of the other class. *Koshland v. Helvering*, 298 U. S. 441; *Helvering v. Gowran*, 302 U. S. 238; *Helvering v. Pfeiffer*, 302

U.S. 247. Judge Turner explained *Helvering v. Sproule*, 318 U.S. 604, where a dividend of nonvoting common stock was distributed on both voting and nonvoting common stock, as a case where the court treated the distinction between voting and nonvoting common stock as immaterial. The test to be applied is "whether the payment of the dividend . . . did effect such a change in the stock and proprietary interests amongst all of the stockholders, taking into account each class of stock and the relationship between them before and after the distribution, or whether there was any change of relationship between the holders of the stock and the corporation which might be indicative of a change in their interests in the net value of the corporation."

Judge Turner pointed out that by the distribution the company had obligated itself to pay \$36,000 in dividends annually to the Class A stock, instead of \$24,000, before dividend payments to the Class B stock, and in the event of liquidation to pay \$600,000 on the Class A stock, instead of \$400,000, before payments to Class B stock. Thus, acquisition of these fixed rights changed materially the proportionate interest formerly represented by Class A stock. Furthermore, the proportionate interest of the Class B stock was materially changed because it became entitled to an additional \$24,000 annually in dividends before sharing the excess equally with the Class A shares, and any excess would be divided differently because the number of Class B shares was increased by 12,000 while the number of Class A shares was increased only by 2,000; in the event of liquidation, the Class B shares were entitled to an additional \$60,000 before participation of Class A shares. The shifting of interests between the classes was reciprocal, so that the proportionate interests of both classes were changed. This determination on the basis of classes of stock was not to be avoided merely because some stockholders fortuitously held identi-

cal percentages of each class of stock; in spite of the unified nature of the transaction, the dividend distribution should be treated separately with respect to each class.

Only Judge Van Fossan dissented on the ground that the distribution effected no immediate change in the proportionate interests of the shareholders in the net assets or value of the corporation. As Judge Van Fossan viewed the case of *Strassburger v. Commissioner*, 318 U.S. 604, the effect of the distribution on future

dividends or liquidating distributions should not be considered.

Judge Oppen, speaking for four judges, took the position that no income was received by the stockholders who held identical percentages of each class of stock. The "proportional interest" test, in his view, was to be applied to the individual stockholder, and not to the whole body of stockholders considered as a single class, citing *United States v. Phellis*, 257 U.S. 156, 174. As to the stockholders holding only Class B shares,

they should not be taxed, for the evidence showed that they gave up, on an over-all basis, benefits to the Class A stock.

The viewpoint expressed by Judge Oppen has substantial merit and the problem needs further judicial consideration. It has application not only in the case of stock dividends, but also in various situations arising in connection with Section 115 (g) of the Code. The administrative difficulties created seem the principal obstacle to its adoption.

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

■ A highly successful mid-year meeting of the Executive Council and National Committee Chairmen of the Junior Bar Conference was held at the Edgewater Beach Hotel in Chicago on Saturday and Sunday, February 25 and 26, 1950. In attendance at this meeting were all national officers and council members and a great majority of the chairmen of the national committees of the Conference.

Reports were received on progress in the several circuits in implementing the Conference program for the year 1950; committee chairmen likewise reported on their activities to date and their programs for the balance of the year.

Recommendations of Activities Committee

The Activities Committee, under Chairman Paul Lashly, presented a number of recommendations for the elimination and consolidation of the work of certain of the Conference committees and also suggested certain new lines of endeavor that the Conference might undertake. The Council approved the elimination of the Small Loans Studies Committee and The Restatement of the Law Committee. The Council also adopted the Committee's recommen-

dations for the consolidation of the Awards of Merit Committee with the Committee on Cooperation with Junior Bar Groups and the Committee on Justice of Peace and Similar Improvement. These changes are to become effective January 1, 1951.

As the result of another suggestion of the Activities Committee, the Chairman appointed a special committee consisting of five council members and committee chairmen to investigate the economic and placement problems of younger lawyers and to make a formal report on the subject at the September meeting of the Council.

Elizabeth Carp, Chairman of the Committee on Cooperation with Junior Bar Groups, presented to the Council applications for affiliation from the Texarkana Junior Bar Association, the Topeka Junior Bar Association, the Greater Oklahoma City Junior Bar Association, and the Waco Junior Bar Association. The Council unanimously approved the affiliation of these organizations with the Conference and expressed a hope that each of them would participate actively in Conference work.

Bowerman Committee Report Is Discussed

The Council, at the February meet-

ing, discussed extensively the so-called "Bowerman Committee Report". This report was prepared by a special Council committee under the leadership of Richard Bowerman of New Haven, Connecticut, Council Member for the Second Circuit, and deals primarily with possible methods of making the nominating and election procedure for Conference officers more democratic and of improving the administrative functioning of the Conference. The Council adopted, with minor amendments, the administrative and procedural improvements recommended by the Bowerman committee, but deferred action on proposed changes in nominating and election procedure until the September meeting of the Council and Conference.

Principal among the administrative improvements adopted by the Council are rules requiring Council members to make their recommendations for appointments of state chairmen within their respective circuits within a period of one month after each annual meeting of the Conference and the further requirement that state chairmen shall in turn make their recommendations for appointments to national committee positions within their respective states within one month after notification of their appointments as state chairmen. In the event of the failure of a state chairman thus to act, the chairmen of the national committees shall be vested with full authority to make their own appointments in such manner as they see fit.

Other matters covered in the administrative section of the Bowerman Committee Report include purposes and objectives of the Conference, reports, expenses, and general policy.

The Council directed the Bowerman committee to prepare the administrative changes approved by the Council in manual form for presentation to the Annual Meeting of the Conference in September.

High on the agenda of the fall meeting will be a discussion of changes proposed by the Bowerman committee in the procedure for nominating and electing officers and Council members. The majority report of the committee proposes that future nominating committees of the Conference be selected by the Council members from the several circuits, subject, however, to the right of caucuses of the members from each circuit present at the Annual Meeting to make their own selections in lieu of those of the Council members. A minority suggestion provides for the selection of nominating committee members by Council members from a list submitted by state chairmen or state caucuses within each circuit. Another minority suggestion proposes the appointment as members of the nominating Committee of individuals mutually agreed upon by the national chairman and the council members from the respective circuits. Members of the Conference are urged to consider these alternatives carefully and to submit suggestions to the national chairman well prior to the September meeting of the Council.

At its meeting, the National Conference heard complaints regarding improper activities in this field and discussed methods of correcting them.

Copies of the National Statement of Principles of Cooperation Between Life Underwriters and Lawyers may be procured from the National Association of Life Underwriters, 11 West 42d Street, New York 18, New York.

Those attending the Conference for the National Association of Life



Council and Committee Chairmen (seated at table, left to right): John W. Stewart, Elizabeth Carp, Lewis R. Donelson III, Charles R. Fellows, Robert A. Stuart, Joseph A. Madey, John C. Poole, Frank E. Day, E. Paul Mason, Jr., John W. Cummiskey, Charles H. Burton, William R. Eddleman, W. Carlross Morris, Jr., Richard H. Keatinge, Robert H. Hosick, R. Carlton Sharretts, Jr., Julius Marymor, C. Baxter Jones, Jr., Wiley E. Mayne, James L. DeSouza, Richard H. Bowerman, Robert D. Price, Stanley M. Brown, John H. Lashly; (standing, left to right) T. Julian Skinner, Jr., James M. Spiro, Thomas Cooch, Walter P. Armstrong, Jr.

Annual Meeting Plans Are Outlined

John Moore of Washington, D. C., Chairman of the 1950 Annual Meeting Committee, outlined plans of the Committee for the annual meeting of the Conference to be held in Washington, D. C., commencing on Saturday, September 16, 1950. The next meeting of the Executive Council will convene in Washington, D. C., on September 16 at the Washington Hotel, which is the hotel where all meetings of the Conference will be held during the annual meeting. General meetings will commence on Sunday, September 17, and continue through Tuesday, September

19, 1950.

Chairman Moore outlined to the mid-year meeting an active program of entertainment being planned by his committee and the Junior Bar Section of the Association of the Bar of the District of Columbia and it is expected that the 1950 meeting of the Conference will be one of the most successful in our history. Conference members are urged to request reservations at the Washington Hotel immediately in order to avoid disappointment, and to forward such requests to the Reservations Bureau, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, as quickly as possible.

Underwriters were John Kellam, C.L.U., General Agent, National Life of Vermont, New York City; Albert Hirst, Counsel for the New York State Life Underwriters Association, New York City; and James B. Hallett, General Counsel, National Association of Life Underwriters, New York City. The American Bar Association's representatives were Edwin M. Otterbourg, New York City; John D. Randall, Cedar Rapids, Iowa; Thomas J. Boodell,

Chicago, Illinois; David F. Maxwell, Philadelphia, Pennsylvania. Others present by invitation were Hugh S. Campbell, Counsel, Phoenix Mutual Life Insurance Company, Hartford, Connecticut; Abraham Davis, Boris Kostelanetz and A. Lincoln Lavine of the New York County Lawyers' Association and Paul W. Adams, Hartford, Connecticut, Chairman, Junior Bar Committee, Section of Taxation, American Bar Association.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge



Otis T. BRADLEY

■ The New York State Bar Association held its 73d Annual Meeting in New York City in January. Section meetings were held Wednesday through Friday, with the general meeting taking place Friday and Saturday, concluding with a dinner attended by over 1000 members and guests.

Neil G. Harrison, President, presided at the Friday meeting at which Harrison Tweed, President of the American Law Institute, discussed postlegal education. Harold Gallagher, President of the American Bar Association, delivered the Annual Address speaking on "Constitutional Problems—The Lawyer's Duty". In the afternoon a debate was held as to whether a judicial officer should testify in any action or proceeding as to reputation and character. A resolution urging prohibition of such testimony was defeated. Friday afternoon the members in attendance were guests of The Association of the Bar of the City of New York at a reception.

Saturday's meeting was held in cooperation with the Association's newly-formed Section on Taxation, of which Weston Vernon, Jr., of New York City, was Chairman. Among the speakers were Thomas J. Lynch, General Counsel, United States Treasury, Dr. Robert Johnson, Presi-

dent of Temple University and Chairman of the Citizen's Committee for the Hoover Report, and Judge Marion J. Harron of the Tax Court of the United States.

At the final dinner, Leonard W. Brockington, of Ottawa, King's Counsel, was the featured speaker. Associate Justice Edward S. Dore, Appellate Division, First Department, and former Associate Judge Bruce Bromley of the Court of Appeals were also speakers.

At the conclusion of the meeting, Otis T. Bradley of New York City was elected President for the coming year. Mr. Bradley had previously served as a vice president and as Chairman of the Executive Committee and of the Committee on Public Relations. Chester Wood and Robert C. Poskanzer, both of Albany, were reelected Secretary and Treasurer respectively.

■ The Second Annual Institute on Federal Taxation, sponsored by the Southwestern Legal Foundation of which Robert G. Storey is President, was held in February and attracted a very large attendance. The Institute was conducted by a panel of government representatives and other outstanding tax authorities.

Among the subjects covered were federal taxation of family partnerships, sale and lease-back transactions, tax problems in the sale of a business, estate planning, pending federal tax legislation, tax frauds, income tax on carried and net profits interests in oil and gas. Among the speakers were Merle Miller, Indianapolis; William L. Cary, Chicago; and Samuel O. Clark, Jr.

J. Paul Jackson, the Chairman of the Committee on Taxation, and

George E. Ray of Dallas, Chairman of the Planning Committee, assisted President Storey in the organization of the Institute. The First Annual Institute sponsored by the Foundation was devoted to federal taxation of oil and gas and the lectures given constituted a complete treatment of this subject. The lectures may be secured from the Southwestern Legal Foundation.

■ Commonly-used legal forms have been prepared by the San Antonio Bar Association for its members at small cost. The forms are designed to improve upon forms previously in common use.

They include earnest money contract, sale of real estate, warranty deed, warranty deed with vendor's lien, real estate note (vendor's lien and deed of trust), deed of trust, builder's and mechanic's lien, builder's and mechanic's note, transfer real estate note and lien, release real estate note and lien, partial release real estate note and lien, extension real estate note and lien, collateral transfer real estate note and lien, promissory note (hand note), chattel mortgage, and chattel mortgage note.

Additional information concerning the forms may be obtained from James A. McKay, Jr., Secretary of the San Antonio Bar Association, 712 Frost Bank Building, San Antonio.

■ The Texas State Junior Bar has recently started a new series of radio broadcasts in Austin entitled "Cross-Examination". Prominent citizens are invited to appear and state their views concerning a matter of public interest, and are then subjected to questions by two members of the Junior Bar.

In addition, a new series of thirteen fifteen-minute transcriptions depicting situations of a legal nature in everyday affairs has been recorded by Radio House, University of Texas, for the Junior Bar. This new series, which was prepared by Gale Adkins, includes the following:

No. 1: The necessity for having a lease when renting a piece of business property. No. 2: To be legal, a will must either be witnessed or it must be in the handwriting of the testator. No. 3: The desirability of a limited partnership agreement. No. 4: The advantage to an employer of taking out workmen's compensation insurance. No. 5: The illegality of price fixing and boycotting.

No. 6: Before you sign a contract to buy, have it examined closely—it may contain restrictions affecting the value of the property. No. 7: Before you buy a piece of property, have the title cleared. No. 8: You cannot mortgage your homestead. No. 9: If you want your beneficiary to have a free hand with the property, put a clause in your will making the administration free from the order of court.

No. 10: Short-term capital gains are heavily taxed. No. 11: A checkroom is responsible for reasonable care of articles left with it—even though it may have a sign up disclaiming responsibility. No. 12: If you install equipment classified as inherently dangerous, you are responsible for inspecting that equipment for defects in construction. No. 13: The law of mislaid property holds the finder of such property respon-

sible to the true owner.

Known as "That's the Law", the series will be used in radio broadcasts not only in Texas but also across the nation. Bar associations interested in obtaining copies of scripts and radio transcriptions may write Richard G. Avent, Capital National Bank Building, Austin.

John L. LASKEY



Harris & Ewing

■ John L. Laskey became President of the Bar Association of the District of Columbia upon the death of Jerome F. Barnard, who died January 2, 1950. Mr. Laskey is a graduate of the law school of Georgetown University and is President of the Washington College of Law. He has served as an Assistant United States Attorney and counsel to important special committees of the Congress.

■ A revelation which should be of

great comfort to the great numbers of law school graduates who "flunk" their examinations for admission to the Bar in New York State is made by John Kirkland Clark, former President of the State Board of Law Examiners in the January issue of the *Bar Bulletin* of the New York County Lawyers' Association. The results of the last examinations, published last January 3, showed that only 492 out of the 1,124 who took the test made the grade.

In an article, "So You're Facing the Bar Exams!", in which he describes the nature of the fear-provoking test and the reasons for it, Mr. Clark, now a member of the President's Loyalty Review Board, tells the failures to try again—don't become discouraged. He says:

"You will be surprised to learn, as you come to know the members of the bar better, how many of those who have carved out prominent places in the practice of the law found the test one they could not successfully meet on the first trial.

"If the writer of this article had not had the unhappy experience of 'flunking', he probably would never had had the interesting and thoroughly enjoyable experience of over a quarter of a century of service on the State Board of Law Examiners."

Legal Aid

(Continued from page 267)

know that if we are to serve both our clients and society to the full, we must be free; and free we will not be if we are the beneficiaries of government handouts or subsidies.

• • •

Rather let us be about our own professional business by supplying Legal Aid in every locality to every person rightly entitled to it. It is already being done in several counties. Is not the extension of Legal Aid to every county of the State by the bar obviously the first order of business of the lawyers of New Jersey? Over the past twelve months we have shown what can be done by wholehearted cooperation in improving the administration of justice. Let us set an example to the bar of the entire country by showing in

every county of the State that we can take care of this whole problem of Legal Aid here and now. Let us show the other professions that no matter what others may do, the bar intends to remain free and independent.

The lawyers of New Jersey promptly accepted the challenge of their Chief Justice and, under the leadership of their state bar association, have in the past four months incorporated legal aid societies in fourteen of New Jersey's twenty-one counties. Before the year is out, it is expected that New Jersey will have a legal aid society in every county of the state.

The program envisaged for the National Legal Aid Association should, if properly directed and financed, take the teeth from the ever-

increasing arguments for government-financed and controlled legal assistance for those who cannot afford to pay for it. The well-organized legal aid society is a constructive answer to those who argue for varying degrees of socialization of our profession. As stated by Harrison Tweed, with characteristic bluntness, in an article shortly to be published in the *New York University Law Review*:

... the Bar must so act as to demonstrate the sincerity of its effort to discharge its responsibility to men and women of all financial conditions. If it does that, the public probably will leave the matter in the hands of the profession for a reasonable period of grace. If not, the matter promptly will become a political issue.

Proceedings of the House of Delegates:

Mid-Year Meeting, February 27-28, 1950

■ This is a complete summary of the 1950 Mid-Year Meeting of the House of Delegates. It includes a report of the debates on the floor of the House and the complete text of resolutions adopted by the House.

FIRST SESSION

■ The 1950 Mid-Year Meeting of the House of Delegates of the American Bar Association convened at 10:05 o'clock on the morning of Monday, February 27, in the Edgewater Beach Hotel, Chicago, Illinois. Harold J. Gallagher of New York, President of the Association, presided.

After the roll call by the Secretary, Joseph D. Stecher of Ohio, the report of the Committee on Credentials and Admissions, given by the committee chairman, Glenn M. Coulter of Michigan, was approved by the House. On motion of the Secretary, the House voted to approve the record of the meeting of the House at St. Louis in September.

President Gallagher then made his report. He recalled the purposes of the Association as stated in the Constitution of the Association, and mentioned the work of the Committee on American Citizenship which is studying the literature available for distribution in the schools to promote good citizenship. He announced that the Board of Governors had authorized appointment of a General Committee on Coordination to correlate and promote the activities of bar associations throughout the United

States, and that, as a result of the work of that committee, local coordinating committees have been organized in forty-five states to aid in coordinating the work of the American Bar Association with that of state and local associations. It is time to take the step, the President said, to tie in "the various associations of the various states into one body, one common body, with common understanding . . . to weld the separate Bars of the states into one common purpose, one common sympathy." This, he continued, is necessary for the perpetuation of the American system. He spoke of the organization of the Conference of Bar Association Presidents which had been effected at a meeting of the heads of thirty-five state bar association held February 26.

President Stresses Need for Legal Aid Service

The President then turned to the problem of providing adequate legal service to all who need it. He said that a National Legal Aid Service had been organized to promote and foster that project, calling attention to his radio address printed in the January issue of the JOURNAL (36 A.B.A.J. 24) which gives full details.

He declared that, "I think that there has been nothing which the Association has done or can do which will promote greater public relations than the extension of low-cost service or, better called, the Legal Referral Plan Service."

He then explained that the Chairman of the House of Delegates, James R. Morford of Delaware, was ill, and, in accordance with the By-Laws, turned the chair over to the Secretary. Upon motion of Roy E. Willy of South Dakota, Howard L. Barkdull of Ohio was elected Chairman of the House *pro tempore*.

Charles W. Pettengill of Connecticut, Chairman of the newly-formed Conference of Bar Association Presidents, was introduced to the House and spoke briefly.

On motion of Mr. Willy, Chairman of the Committee on Rules and Calendar, the House adopted the printed calendar as the order of the day for the session.

Resolutions were received for reference to the Committee on Draft from the following: Cuthbert S. Baldwin and LeDoux R. Provosty of Louisiana, Charles S. Rhyne of the District of Columbia and John R. Snively of Illinois. The content of the resolutions and the action of the House upon them are reported *infra* beginning at page 341.

**Board of Governors
Report Summarized**

Secretary Stecher then read the report of the Board of Governors which is here summarized:

(1) Olive G. Ricker was reelected Executive Secretary and James P. Economos was reelected Assistant Secretary. The members of the Board of Elections, Edward T. Fairchild of Wisconsin, Chairman, William P. MacCracken, Jr., of the District of Columbia and Harold L. Reeve of Illinois were also reelected.

(2) Substantially all the special committees of the Association were continued for the current year and the President was authorized to appoint certain advisory committees. The list of these committees appears in the Association directory, commonly called the "Red Book".

(3) The name of the Special Committee on Low Cost Legal Service was changed to "Committee on Lawyers' Reference Service".

(4) The President was given authority to appoint a new Special Committee on Coordination of Bar Activities and Integration of Effort of State and Local Associations with the American Bar Association.

(4) The President was given authority to appoint a special committee to cooperate with the Survey of the Legal Profession to enlist the support of film producers in making and promoting documentary films about the work of lawyers.

(5) The President was authorized to appoint a Special Committee on Business Legal Problems in Occupied and ECA Countries.

(6) The following special committees were also authorized:

(a) Special Committee To Study and Report to the Board on the Advisability of Renewing a Program of Regional Meetings;

(b) Special Committee for Scientific Study of the Effect of Crime Portrayals in the Various Media—Motion Pictures, Radio and Comics;

(c) Special Committee To Study and Report on the Matter of Group Insurance and Retirement Benefits for Lawyers;

(d) Special Committee on Social Security;

(e) Special Committee to Cooperate with the Survey of the Legal Profession in the Preparation of a Complete List of Lawyers in the United States.

(7) The President was authorized to appoint conference groups under the Standing Committee on Public Relations to confer with similar groups from the fields of motion pictures, radio, publishers and the theater.

(8) The Board recommended the following resolution to the House for approval:

RESOLVED, that the American Bar Association opposes any legislation which would bring self-employed practicing lawyers within the coverage of the Social Security Act and authorizes the Special Committee on Social Security to present the position of this Association to the appropriate committees of Congress in connection with H. R. 6000 or any other bill designed to bring lawyers within the coverage of the Social Security Act.

(9) The Board decided that henceforth the Annual Report shall be sent only to members who manifest a desire to receive it.

(10) The Board approved the following recommendations of the Publications Committee:

(a) With the exception of Section periodicals which have been heretofore established and approved, Section or Committee material for distribution to the members of a Section, to the members of the Association generally, or to the general public, whether printed, mimeographed or otherwise produced, shall hereafter be submitted to the Executive Secretary in advance of production for distribution, accompanied by information as to the form, number of copies contemplated, proposed arrangements for printing and distribution, and probable cost.

(b) Every printed or mimeographed report for distribution, which contains a resolution or recommendation, shall have prominently displayed on the cover or in the heading the following statement: "Nothing herein contained shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or

the Board of Governors."

It was emphasized that no question of censorship was involved in these recommendations, their purpose merely being to secure uniformity of format, effect economies in printing and distribution and to assure that the central office of the Association and the Public Relations Committee will know what is being distributed.

(11) The Board took action directing that no member of a Section shall be considered in good standing or qualified to exercise or receive any privilege of Section membership who is in default of his Section dues for six months, and that such a member shall be automatically dropped from the Section roster at the end of one year of such default.

(12) The Board authorized the President to designate representatives of the Committee on Peace and Law Through United Nations to appear before the Senate Committee on Foreign Affairs with respect to the position of the Association on the Genocide Convention. Alfred J. Schweppe of Washington, Carl B. Rix of Wisconsin and George A. Finch of the District of Columbia were so designated.

(13) The Board accepted a report from the special committee appointed to report on the propriety of members of the judiciary appearing and testifying in criminal and civil cases. The Board recommended that it be released and also be published in the JOURNAL.

(14) The Board approved the following resolution presented by the Section of Administrative Law:

WHEREAS, By resolution of the House of Delegates of the American Bar Association in March, 1944, and December, 1945, The Association's then Special Committee on Administrative Law was (1) authorized to seek the enactment of the Federal Administrative Procedure Act and also (2) directed to continue its studies and efforts to secure other and additional measures for bettering the administration of justice involving administrative agencies; and

WHEREAS, for the foregoing purposes, the House of Delegates also (3) directed that the committee should

have the cooperation and assistance of the officers of the Association, the Board of Governors, the members of the Association and (4) urged that officers, boards, sections, committees and members of state and local bar associations cooperate with the committee;

NOW, THEREFORE, BE IT RESOLVED, That the House of Delegates reaffirms those resolutions and directs that the Section of Administrative Law, as the successor of the prior Special Committee on Administrative Law, by all necessary and proper means including appearances before legislative committees (1) preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes, and (3) procure the assistance of officers, units, and members of the Association as well as the cooperation of those state and local bar associations; and

BE IT ALSO RESOLVED, that the Section of Administrative Law collaborate with local bar associations in the performance of the same functions, with like aid and cooperation, in connection with the administrative law of the states, territories, possessions, and District of Columbia.

(15) The Board also approved the following resolution:

RESOLVED, That whenever a resolution offered by any Section or Committee of the Association, which is approved, authorizes the appearance of representatives of the Association by two or more sections or committees before a court or a legislative or administrative body, the President of the Association be authorized to designate a representative or representatives of the Association for such purpose.

The House voted to approve the actions and recommendations of the Board.

Harold H. Bredell Gives Treasurer's Report

Harold H. Bredell of Indiana, the Treasurer of the Association, gave his report. He said that the total assets for this year are \$454,513.84 compared with total assets of \$455,354.99 for the same period last year, substantially the same. The estimated income for the year is \$475,000, he continued, of which all but

\$20,000 has been received. While the total appropriations for the year are \$494,509 experience of previous years indicates that there will be enough lapse of appropriations and enough excess of income by the end of the fiscal year to balance the Association's budget. The Treasurer's report was received and filed.

Albert B. Houghton of Wisconsin reported for the Budget Committee, of which he is the chairman. He declared that the Committee was making every effort to assist Sections and committees, and that appropriations were being made as large as possible.

Walter M. Bastian of the District of Columbia, Chairman of the Membership Committee, reported an increase of membership from 40,926 to 41,698 for the year. He praised the Junior Bar Conference for its work in this field.

W. J. Jameson of Montana, speaking as chairman of the Committee on Scope and Correlation, said that his committee had no extensive report to make. He said that the committee was now devoting its efforts largely to better utilization of the Association's resources. He expects to have recommendations for a change in the By-Laws and Constitution of the Association at the Annual Meeting, he said.

The next item on the calendar was the report of the Committee on Coordination of Bar Activities given by its chairman, Robert R. Milam of Florida. He said that the first effort of his committee was to establish liaison between committees of the American Bar Association and corresponding committees of state and local bar associations. To effect that, he proposed establishment of a liaison council composed of one member from each state to meet with the committee. He stressed the fact that the cooperation of the state and local associations with the American Bar Association is purely voluntary, and that there is no wish to encroach upon local activities in any way. He said that the Conference of State Bar Presidents would be of great help in coordination, and that, in connection with the House of Delegates, they already provide "a sounding board of

organized legal opinion, of bar association opinion, on important issues in this country".

He moved that the following resolution be adopted, and the motion was carried:

1. That the voluntary integration of effort and coordination of the work of the American Bar Association with that of the state and local associations is of paramount importance and such coordination will greatly strengthen the organized Bar and increase its effectiveness in attaining the proper ends of the organized Bar.

The committee had a second resolution that would have set up the office of Director of Coordination and Public Relations. The Board of Governors recommended that it be referred to the Board for further study, and the committee acquiesced. Upon motion of the Secretary, the House voted its approval of the referral.

John Kirkland Clark Suggests an Executive Vice President

John Kirkland Clark of New York said that he thought the committee's proposal gave the House the opportunity to consider creating the office of Executive Vice President of the Association to relieve the tremendous burden placed upon the President. Mr. Barkdull remarked that the Committee on Scope and Correlation had submitted a recommendation to that effect to the Board of Governors, where it is now under consideration.

Orison S. Marden of New York, Chairman of the Committee on Legal Aid Work, reporting for that committee, said that there had been a 20 per cent increase in the number of legal aid units in the country during the last four years. He attributed this increase largely to aroused interest of the Bar. He said that there were yet fifty cities in the United States having a population of over 100,000 that had no legal aid service. The main obstacle, he said, is lethargy of the Bar, but that he expected the newly-organized National Legal Aid Association and the English aid and advice scheme to help in extension of legal aid work. He pointed to New Jersey as the leader in the

field among the states of the Union. Quoting Dean Robert G. Storey, he concluded by saying that, "Legal aid and the Lawyer Reference Plan will do more than anything else to stop the trend toward regimentation of the legal profession. No greater challenge faces the Bar today."

The report of the committee was then received and filed.

William M. Wherry Reports on Lawyers' Reference

The report of the Committee on Lawyers' Reference Service, was given by William M. Wherry of New York, the chairman of the committee. He said that the greatest task of the committee was to educate lawyers and to persuade them that legal referral service is going to be of benefit to the Bar. The next task, he continued, was to educate the public, which has fallen into the habit of looking elsewhere for legal advice. This he blamed on the attitude of the legal profession that there is no source of income in giving clients advice on such small matters as small income tax returns. He said that it was the duty of the profession as a public service to make legal advice available to all who need it, and that this was not unprofitable to lawyers. He called the legal referral service "the greatest benefit to this profession that I can conceive of in establishing its public relations". "Legal referral service is an attempt to teach the public when it needs a lawyer and how to get one, and it is to convince the public that the compensation which will be demanded by the lawyer is not going to be exorbitant, but is going to be reasonable," he said. The service is preventive law, he declared, since 86 per cent of the cases handled by legal referral offices are disposed of by consultation.

Legal Education Section Proposes New Standard for Bar

The House then turned to the report of the Section of Legal Education and Admissions to the Bar, given by the Section chairman, Richard Bentley of Illinois. He reported the following resolution and moved its adoption by the House:

WHEREAS, Applications for provisional approval by the American Bar Association have been made by the law schools named below, and an investigation of each of these schools shows that each is in compliance with the minimum standards of the American Bar Association; therefore be it

RESOLVED, That the American Bar Association provisionally approves—subject to annual inspection, until full approval be given—the following law schools:

University of California Law School at Los Angeles; North Carolina College Law School at Durham; State A. and M. College Law School at Orangeburg, South Carolina; Franklin University Law School of Columbus, Ohio.

The resolution was unanimously carried by the House without debate.

He then proposed the following resolution:

RESOLVED, That effective in the fall of 1952 standard (1) (a) of the American Bar Association for an approved law school shall be amended so that as amended it shall read as follows:

"(a) It shall require as a condition to admission at least three years of acceptable college work, except that a school which requires four years of full time work or an equivalent of part time work for the first professional degree in law may admit a student who has successfully completed two years of acceptable college work."

Mr. Bentley said that the two-year prelegal requirement was adopted by the Association in 1921, at a time when there was no state in the Union that required two years of college education for admission to the Bar. Today, he said, all but three require at least two years. The Section has been concerned with the overcrowding of the profession which has caused some lawyers to resort to unethical practices to meet the competition of better-trained members of the Bar. This recommendation would ensure that lawyers joining the profession would be better qualified and would not have to resort to such practices. Every argument that is made against the present proposal was made against the two-year requirement in 1921, he said, but the dire predictions were not fulfilled. The question is this, Mr. Bentley

concluded, "Whether this Association at this time still feels as it did in 1921, that more legal education is advisable and whether this Association is willing to continue to take the leadership toward improving the standards of the legal profession in the learned profession known as the law."

Henry Upson Sims of Alabama spoke in opposition to the resolution offered by the Section. He said that it was impossible to teach all the law in three or even four years, and that law schools are supposed to be teaching how to find the law and how to reason. To increase the prelegal college requirements to three years would mean that the students would learn a little more about a few subjects, but would merely drive many law students to night law schools and other law schools that the Association does not approve. He said that he thought that the House should wait until the Association of American Law Schools, which has a committee studying the proposal, has taken action. He moved that action on Mr. Bentley's resolution be postponed until the report of the law school association was received.

At this point, on motion of Roy Willy, Chairman of the Committee on Rules and Calendar, the House recessed until 2 P. M.

SECOND SESSION

■ The House reconvened at 2:05 P. M. with the temporary chairman, Howard L. Barkdull, presiding. Debate on the motion to postpone action on the Section of Legal Education's proposal to require three years of college work for admission to law school continued.

Whitney North Seymour of New York spoke in favor of immediate action on the Section's proposal. He pointed out that the Association of American Law Schools will not act until next December, and that the earliest the House could consider the proposal after that would be February, 1951. The only effect of postponement would be to put off a very desirable improvement in the standards required for admission to the

Bar, leaving prospective law students in doubt as to what kind of prelegal education they should obtain, he said.

In answer to a question posed by Charles H. Woods of Arizona, Mr. Seymour said that there was no conflict between the Section's proposal and the action of the law school association, and that they had delayed action on the matter largely because of "sentimental" considerations. He said that if the House adopted the three-year rule, the law school association "would conform its own action to that rule in general, very gladly".

Speaking in favor of the resolution of the Section and against postponement, Delger Trowbridge of California said that the sole question is, "Are we going to lead in the field of legal education, or are we going to follow the Association of American Law Schools?"

William W. Gibson of Minnesota, speaking in favor of postponement, said that the proposal merely set up a quantitative standard, and that nothing in the proposal required that the additional work of prelaw students would be of a certain quality or subject matter. He said that the Association ought to wait, since there is no hurry in the matter and it would be officious to act without a joint meeting with the Association of American Law Schools.

Dean of Minnesota Law School Speaks Against Proposal

Maynard D. Persig, Dean of the University of Minnesota's College of Law, was granted unanimous permission to address the House in favor of postponement. He said that the matter had come before the Association of American Law Schools in 1948, and that the proposal had been defeated there by a vote of sixty-six to twenty-five after careful consideration. He said that the law school association and the American Bar Association could work out a common program that would be of great benefit; the two should not be in opposition to each other, he said, and the Section's resolution should

not be adopted for that reason.

Robert G. Storey of Texas declared that 57 per cent of the accredited law schools had already put the three-year college requirement into effect. If the Association of American Law Schools and the American Bar Association are going to act simultaneously or together, "what is the use of our having separate considerations and separate standards?" he asked. "How can we be separate and autonomous, and act as checks and balances on each other, if we must get together and decide?"

Floyd E. Thompson of Illinois inquired of Mr. Bentley whether the Association of American Law Schools' committee had conferred with his Section. Mr. Bentley replied that it had not because the committee had been appointed only recently. He said that there was no conflict between the two, and that the law schools' committee would certainly be invited to make its recommendations to the Section.

Mr. Sims, closing debate on his motion to postpone, said that he thought it essential to know what the law school association thought should be taught in the third year of college and that the House should not act until that association had said that it could profitably use the third year.

The House then voted to defeat Mr. Sims' motion to postpone.

Governor Slaton of Georgia Says Change Is Needed

John M. Slaton of Georgia, speaking in favor of the Section's resolution, said that most professions require a number of years' training before members are permitted to practice. The ethics of the legal profession suffer from inadequate preparation for the Bar, he said, and the people of the Nation need well-trained lawyers, not only as educators of public opinion but as leaders in the Houses of Congress. "If the American Bar Association, representing the profession that administers justice upon which the perpetuity of the government depends, if the American Bar Association says that high standards should be set for this

profession, ought we not to support that?" he demanded.

Douglas Hudson of Kansas remarked that the finest lawyers he had ever known didn't get out of high school, but that there was a "plethora" of lawyers "and somehow we have got to shut off this influx".

John Kirkland Clark of New York spoke in opposition to the three-year proposal. He said that it was a part-way measure proposed instead of requiring a college degree for admission. The third year of college is often the one in which the student learns the least, he said, and the three-year rule might have unfortunate effects on the junior colleges. He favored no action until it had been decided what the contents of the third-year college course would be. "I think it would be a very serious mistake to take a part-way measure of this kind today and I hope very much that this resolution will not be passed today," he concluded, "although under the proper circumstances with the proper qualification, I might be in favor of it."

Karl Llewellyn Says Law Schools Will Adopt Proposal

Mr. Bentley, closing debate on the Section's resolution, asked the following question of Karl Llewellyn, the President of the Association of American Law Schools: "Whether in his opinion if this Association adopts this recommendation at this time, his Association . . . will be likely to follow suit?" Mr. Llewellyn replied that "in my opinion, and in the opinion of the three Past Presidents of the Association [of American Law Schools], two of whom opposed this action on the floor in '48, there is no question whatsoever that the Association will adopt this rule next December."

The House then voted to adopt the resolution offered by the Section of Legal Education and Admissions to the Bar.

Alfred J. Schweppe of Washington moved that promulgation of the new standard for admission to law schools just approved by the House be deferred until January 1, 1951, when the Association of American Law

Schools will have had an opportunity to act upon the proposal. Mr. Bentley, the Section chairman, said that he had no objection, and the motion was carried by a vote of 67 to 33.

The House then turned to consideration of a resolution offered by the Section of International and Comparative Law, presented by the Section's former chairman, Charles S. Rhyne of the District of Columbia. The resolution had been offered to the House at the St. Louis meeting in September, but both the Insurance Section and the Committee on Aeronautical Law had been opposed to it, and the matter was held over for a report by those groups.

The resolution was as follows:

RESOLVED, That the American Bar Association urges the Air Coordinating Committee to instruct the United States delegate to the Legal Committee of the International Civil Aviation Organization to:

(1) Advocate an increase in the present presumptive liability limitation of \$8,291.87 in damages for death or non-fatal personal injury in international air transportation imposed by the Warsaw Convention.

(2) Oppose exonerating the international air carrier from liability to his passengers upon the mere showing that "reasonable measures" were taken by it to conduct a safe operation as urged by the Rapporteur on the revision of the Warsaw Convention.

(3) Insist that aircraft operators should be responsible, regardless of negligence, for damages on the surface to innocent persons and their property, unless the accident is proved to be due to an Act of God or third party, as in the present Rome Convention.

Mr. Rhyne explained that this resolution would advocate what the Section of International Law considers the inequitable rule of the Warsaw Convention whereby persons killed or injured in international air flights on commercial lines are unable to collect more than \$8,291.87 from the carrier unless they can prove willful misconduct. He said that the average person who travels by air does not know about this limitation, and that it is a subsidy to the air carriers which they no longer need.

The resolution would also make the carrier liable for damages to property on the ground caused by airplane crashes unless the crash were due to an Act of God or a third party. In reply to a question by J. Garner Anthony of Hawaii, Mr. Rhyne said that the resolution would put the burden of proof upon the carrier to prove that all necessary measures had been taken to avoid the accident.

Lloyd Wright of California said that he was opposed to the resolution, declaring that air passengers can obtain additional insurance for air flight at a nominal figure if they want it.

L. Welch Pogue of the District of Columbia, Chairman of the Committee on Aeronautical Law, said that he was one of the minority of the committee who were in favor of the resolution. He said that the Warsaw Convention has been ratified by some thirty-three countries, including the United States, while the Rome Convention has been adopted by only a few, of which the United States is not one. A proposal to put it into effect is now under discussion.

Francis H. Inge of Alabama, a member of the Aeronautical Law Committee, spoke for the majority of that committee. He said that the Warsaw Convention imposes virtually absolute liability upon the carrier, and that to raise the amount of damages awarded under it might drive some nations out of the convention. The cost of the increase in the amount will ultimately be passed on to the passenger or to the taxpayer in the form of a government subsidy, he said.

House Votes To Adopt Section's Resolution

In closing the debate on the resolution offered by his Section, Mr. Rhyne said that only two claims in excess of the \$8291.87 limit imposed by the Convention had been allowed since 1934, and that the limit was unfair.

The House voted to adopt the resolution by a vote of 47 to 21.

C. W. Tillett, Chairman of the Section of International and Com-

parative Law, concluded the report of that Section by reporting that the State Department had revised the original draft of its Genocide Convention and had incorporated many of the suggestions made by the Association at the Annual Meeting in St. Louis. He said that a committee had been appointed to study the constitutional aspects of international relations, under the chairmanship of Harold E. Stassen of Pennsylvania, and that a second committee, headed by Dean Robert G. Storey was studying the problem of world government.

Judge Alfred P. Murrah of Oklahoma, Section Delegate of the Section of Judicial Administration, reported that his Section had organized a Conference of Chief Justices, and was at work mobilizing the judicial manpower of the Nation to aid the Association in the accomplishment of its general objects.

Henry F. Long of Massachusetts reported for the Section of Municipal Law. He said that the Section is cooperating with the American Society of Civil Engineers in making a study of financing public and private water and sewerage works, is developing a program of research in the field of municipal law in cooperation with interested law schools, is attempting to awaken interest in the field of municipal law, and is considering publication of a periodical.

William R. Eddleman of Washington, the delegate of the Junior Bar Conference, reported on the formation of the Association of American Law Students and the Conference's work in counteracting subversive propaganda. He said that membership in the Conference had increased by 600 despite graduation of 903 into the senior Association.

Benjamin Wham Reports for Corporation Section

Benjamin Wham of Illinois, delegate of the Section of Corporation, Banking and Business Law, presented the report of that Section. He said that he had agreed to postpone action upon three of the recommen-

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dations of the Section, in deference to wishes of the Section of Administrative Law, and moved that those resolutions be deferred to the next meeting of the Board of Governors or of the House of Delegates. The resolutions came from the Section's Food, Drug and Cosmetic Division, and would have opposed the Hoover Commission's recommendation that the administration of the Food, Drug and Cosmetic Act be split between the Department of Agriculture and a new United Medical Administration; would have opposed H. R. 562, which seeks to amend the export provisions of the Food, Drug and Cosmetic Act; and would have opposed H. R. 4572 which would amend the act as to the issuance of subpoenas. Upon Mr. Wham's motion, the House voted to defer consideration of the resolutions.

Mr. Wham then moved adoption of the following resolution:

RESOLVED, That the American Bar Association opposes the establishment of a food standard under the Federal Food, Drug and Cosmetic Act by an amendment of this Act rather than through the regular procedure defined by it in Section 401.

FURTHER RESOLVED, That the American Bar Association authorizes the Section of Corporation, Banking and Business Law and the Section of Administrative Law to oppose such an amendment at congressional hearings.

After a brief discussion, the House voted unanimously to adopt this resolution.

Mr. Wham then moved adoption of a resolution that would have given the Section authority to follow the hearings through Congress of two bills to control the addition of chemicals to food. A point of order was raised at this, it being pointed out that the Section already has such authority. The chair sustained the point of order.

Mr. Wham then presented a resolution that would favor legislation to prevent the Federal Trade Commission from assuming jurisdiction to enforce the Sherman Act by cease and desist proceedings.

William A. Sutherland of the District of Columbia inquired as to the purpose of this, and Mr. Wham explained that the Federal Trade

Commission does not have concurrent jurisdiction with the federal courts in enforcing the Sherman Act, but that it had adopted the practice of declaring certain acts violative of the Sherman Act to be unfair trade practices. There is no hearing on this finding such as would be obtained in a court, he said.

Mr. Sutherland replied that he thought it unwise for the Association to say that an act is not an unfair act of competition because it happens to be wrongful under the Sherman Act. What the FTC does is entirely innocuous until it has gone into court to enforce its order, he declared. He also said that he did not think that the House or the other groups in the Association should dissipate their influence by recommendations that are not fundamental and on which the Bar cannot agree.

On motion of Albert E. Jenner, Jr., of Illinois, the House voted to defer action on the Section's proposal until the September meeting.

Amendment of FTC Rules Is Urged

The next resolution proposed by Mr. Wham was as follows:

RESOLVED, That the American Bar Association recommends that the Federal Trade Commission adopt rules prescribing settlement procedures which will facilitate the entry of orders on consent of respondents and the Commission without hearings, evidence and findings; and that the Section of Corporation, Banking and Business Law and the Standing Committee on Commerce are authorized to represent the Association in this matter before said Commission.

The resolution was passed unanimously.

The next resolution was as follows:

RESOLVED, That the American Bar Association opposes H.R. 4003 (O'Toole) which would repeal the Miller-Tydings Amendment of Section 1 of the Sherman Act, permitting fair trading of trade-marked products in states authorizing such practice; and that the Section of Corporation, Banking and Business Law and the Standing Committee on Commerce are authorized to represent the Association in this matter before Congress.

The resolution was adopted by a vote of 58 to 33.

Mr. Wham's next resolution dealt with the International Trade Organization, and reads as follows:

WHEREAS, The adherence of the United States to the United Nations is an established element in the foreign policy of this country, and has been wholeheartedly implemented by our government's participation in numerous activities of the Organization since its establishment, thus evidencing a genuine disposition to collaborate with other nations when a constructive and realistic basis can be found; and

WHEREAS, The effectiveness of international collaboration in any field depends in the first instance upon the development of substantial accord as to objectives, and methods of attaining them, and in the second place upon acceptable definition of the terms of such accord and reliable commitments as to the adoption and application of the measures agreed upon; and

WHEREAS, The general objectives of expansion and liberalization of world trade, as originally proposed by the United States' representatives, have been adopted as those of the proposed International Trade Organization and are acceptable to this country; but due to inherent difficulties of adjusting divergent national concepts in social and economic matters, the area of real agreement as to methods of attaining these objectives has been disappointingly limited, and has diminished rather than expanded over the past three years of multilateral negotiations; and

WHEREAS, The inability of the negotiating parties to reach agreement is variously reflected in the Charter, in some cases by vague compromises or ambiguous statements and commitments, in others by extensive exceptions to general principles, and in others by provision for dispensations in favor of individual members, to an extent so great that the attainment of the originally stated objectives by reliance upon such implementation must be regarded as questionable; and

WHEREAS, The concepts expressed in the Charter of economic development, and more particularly the stipulations relating to private investments, evidence unacceptable compromises in derogation of traditional American foreign policy and leave existing or prospective foreign investment with less protection than that now provided by the rules of international law and the stipulations of bilateral treaties on which American nationals may now rely; so that this government's accept-

ance of these inadequate provisions would not only have the immediate effect of prejudicing existing American interests abroad and discouraging the international flow of venture capital, but would also tend to perpetuate such unhealthy conditions by rendering it difficult or impossible to negotiate satisfactory stipulations on this subject in bilateral treaties;

WHEREAS, However worthy the ultimate objectives of the Charter may be, the means proposed for their attainment are not acceptable for the reason, among others, that they depart from traditional American concepts of a free enterprise economy, and the commitments contemplated to be assumed by the United States could only be effectively carried out by employing methods leading to economic nationalism and a planned economy; and

WHEREAS, The provisions of the Charter which permit the Organization itself to amend the organic document, and to grant particular dispensations from its commitments, derogate substantially from its reliability as a diplomatic commitment by other nations, and, regarded as a commitment by this nation, make the Charter undesirable as wanting in certainty and continuity, and hence not conformable to our constitutional processes;

NOW THEREFORE BE IT RESOLVED,

1. That the American Bar Association recommends, by reason of the extensive subject matter, and definitely prospective application of The Havana Charter for an International Trade Organization, that said Charter be regarded as essentially a projected Treaty of the United States, to be entered into validly only after the President shall have transmitted the document to the Senate for its advice and consent, and after its concurrence with the required two-thirds majority.

2. That, for the reasons stated in the preamble to this resolution, the American Bar Association recommends to the Senate of the United States, and to the members of that body, that in the event of consideration by it of The Havana Charter, its consent be withheld, and that it advise the President that the document be not ratified as a treaty of the United States.

3. That, based upon the Association's conclusions as to the advantages and disadvantages of the projected International Trade Association, and its evaluation of the substance of The Havana Charter, and in addition, the conviction that adherence of the United States to the Organization under said Charter can be validly accomplished only by the procedure

required as to treaties, the American Bar Association recommends to the Congress and to its members that in the event that Congressional sanction for such adherence be sought in any other form, no resolution, bill or other legislation to that effect, or susceptible of such interpretation, be enacted into law.

4. That the American Bar Association recommends to the President and to the Secretary of State that consideration be given to the attainment of accepted objectives in international trade (in the degree to which diplomatic engagements can contribute) by the negotiation and conclusion in the near future of bilateral agreements of traditional form and content, with such foreign nations as evidence a disposition to enter into such agreements.

5. That the American Bar Association opposes the passage by the Congress of H.J. Resolution 236.

6. And that the Section of Corporation, Banking and Business Law and the Standing Committee on Commerce are authorized to oppose said Charter in Congress.

Mr. Wham explained that this resolution had been approved by the Board of Governors in May, 1949, and had been deferred until now at the request of the Section of International and Comparative Law. He said that that Section had decided not to oppose the resolution, which also had the support of the Committee on Commerce and the Committee on Customs Law. The House voted to adopt the resolution.

Mr. Wham then offered a resolution that would have made certain noncontroversial recommendations for amendment of the Bankruptcy Act. Secretary Stecher explained that the report on this resolution had been received from the Section too late for consideration of the Board of Governors, and that the latter had therefore recommended that it be referred back to the Section. On motion of Judge Floyd E. Thompson of Illinois, the House concurred in this recommendation of the Board.

The next resolution considered by the House was one that would have placed the House on record as in favor of making labor unions subject to the antitrust laws.

In reply to a question, Mr. Wham

said that this resolution would authorize the Section to represent the Association in Congress and to report to the Board of Governors and to the House with specific recommendations.

George Maurice Morris of the District of Columbia objected that this was the wrong procedure. The recommendations should be before the House before the Section is authorized to appear before Congress. He offered an amendment to the effect that the Association approve the general objectives of the resolution and that the Section report to the Board and to the House its recommendations.

John M. Niehaus of Illinois, delegate of the Section of Labor Law, said that the preparation of any resolution as important to labor as this should have the consideration of his Section, and he moved that the matter be referred to that Section before it was referred to any other body. He said that his Section had many representatives of organized labor, and that the stability of the various Sections should be considered before a resolution is hurriedly passed that might be a direct offense to some members.

Mr. Morris amended his motion to include the Section of Labor Law among the groups to which the proposal was to be referred. Mr. Niehaus accepted this amendment in lieu of his motion, and it was carried 58 to 51.

Increase of Antitrust Penalties Is Opposed

Mr. Wham then turned the floor over to Churchill Rodgers of New York, speaking for the Committee on Commerce, who presented the following resolution, which was unanimously adopted by the House:

RESOLVED, That the American Bar Association opposes H.R. 6679 to increase criminal penalties under the Sherman and Clayton Anti-Trust Acts; and that the Section of Corporation, Banking and Business Law and the Standing Committee on Commerce are authorized to represent the Association in this matter before Congress.

Mr. Wham then moved adoption of the following, which the House approved:

RESOLVED, That the American Bar Association opposes S. 2408 to amend the Securities and Exchange Commission Act of 1934 to include additional companies and authorizes the Section of Corporation, Banking and Business Law to represent the Association in this matter before Congress.

Mr. Wham then attempted to introduce a resolution that would have given the Section authority to follow two bills in Congress, the purpose of which was to "authorize participation in a cooperative endeavor for assisting in the development of economically underdeveloped areas of the world." It was objected by Mr. Jenner of Illinois that the Section already had the authority sought by the Resolution and that it was out of order. The chair sustained Mr. Jenner's point.

The House then recessed at 5:05 P. M.

THIRD SESSION

■ The House reconvened at 10:40 A. M. on February 28. James R. Morford of Delaware, the Chairman of the House, presided.

As a special order of business, the House turned to consideration of the report of the Committee on Admiralty and Maritime Law, presented by Arnold W. Knauth of New York, the committee's chairman.

He moved that the following resolution be adopted:

RESOLVED, That the House of Delegates of the American Bar Association opposes the granting of admiralty jurisdiction to the Bankruptcy Court, as is proposed in H.R. 3111, 81st Congress, 1st Session, at page 3, line 24 (the proposal being controversial and not properly included in a "non-controversial" Bill) and authorizes the Standing Committee on Admiralty and Maritime Law to appear before the Congress and express such opposition.

He explained that the maritime law has a highly-elaborate credit system, and that to place admiralty under the jurisdiction of the bankruptcy laws would throw that system into confusion. It is far from being non-

controversial, as the sponsors of the Bankruptcy Act amendment say, he continued.

Mr. Wham, speaking for the Section of Corporation, Banking and Business Law, said that that Section was in full accord with the Committee's resolution, but that it was also in favor of the rest of the proposed bankruptcy amendment. He moved to amend Mr. Knauth's motion so that it would include general approval of the changes proposed in the Bankruptcy Act.

Mr. Knauth replied that his committee was indifferent to the rest of the changes, but that the bill would also repeal all laws inconsistent with it, and this would include all maritime credit laws.

Karl C. Williams of Illinois said that he thought that in fairness to the Admiralty Committee the House should endorse what they proposed and not encumber their resolution with the proposals of another Section.

The House then voted on Mr. Wham's amendment, which was defeated, and upon the Admiralty Committee's resolution, which was adopted.

Patent Section's Resolutions Are Adopted

Albert R. Teare of Ohio, Chairman of the Section of Patent, Trade-Mark and Copyright Law, in his report for that Section proposed the following resolutions:

1. That the Association oppose the extension of the Royalty Adjustment Act (35 U.S.C., 89-96) to times of peace. Specifically, the Association disapproves S. 956 and H.R. 2477, providing for such extension. That the Section chairman be authorized to communicate to interested parties the action of the Association in adopting this resolution.

2. That the Association approve S. 2128 as amended and approve the principle of allowing the government at the request of a patent owner to modify any license agreement when equity so requires, and that the Section Chairman be authorized to communicate to interested parties the action of the Association in adopting its recommendation.

As for the first, Mr. Teare explained

that the Royalty Adjustment Act was a wartime measure that limited the amount of royalties that could be obtained on a patented product when that product was sold to the Government. It was an excellent measure in wartime, he said, but the Section thinks that the head of a government department should not be allowed to continue to limit the royalties during peacetime. The second resolution, he continued, would approve termination of non-royalty licenses given to the Government during the war. The licenses in question carry a provision for termination at the official end of the war, which has not, of course, occurred, he said.

The House voted to adopt both resolutions.

Mr. Teare then presented the following and moved that it be adopted by the House:

3. That the Association approve amendments to the Trade-Mark Act of 1946 (Lanham Act) as shown in the report accompanying this recommendation.

This resolution would enable the Section to present to Congress its recommendations to aid in clarifying the provisions of the Lanham Act, Mr. Teare said. The proposed changes are very complex, and most deal with aiding in the prosecution of applications, eliminating grammatical and typographical errors.

The House voted to adopt the resolution.

The Section's last resolution was as follows:

4. That the Association disapprove an amendment to the Constitution which would empower Congress to regulate the use and ownership of trade-marks and specifically disapprove H.J. Res. 229 in principle. That the Section chairman be authorized to communicate the action of the Association in adopting this resolution to interested parties.

The effect of H.J. Res. 229 would be to destroy the common law of trade-marks, he said, and the Section believes that there is no necessity for such a change.

The House voted to adopt the resolution.

H. Cecil Kilpatrick of the District of Columbia, Chairman of the Section of Taxation, offered two resolutions for his Section; the resolutions dealt with changes in the Internal Revenue Code, and because of their length and technical nature are not printed here. Copies can be obtained from the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. In general, the first dealt with the problem of involuntary conversion—that is, the situation where property is condemned and the taxpayer is forced to pay taxes on the profit. If an individual exchanges one residence for another, both having equal current value but a different tax base, he must pay tax on the difference between his original cost and the present value, although his profit is purely a paper one. The Section's resolution proposes to treat the new residence as a continuing investment, postponing taxation of the gain until the sale of the second house.

The Section's second resolution dealt with employee's stock options. Mr. Kilpatrick explained that many corporations, as an incentive to their employees, give them options to purchase the corporation's stock at or below market value. Where the option is given as compensation and the stock is worth more than what the employee pays, the difference is taxable at that time to him as income. Many employees are forced to sell a substantial part of the stock to pay the tax, and this has caused many companies to abandon the incentive plan. The Section's resolution, if enacted into law, would defer the tax until the employee voluntarily disposes of the stock, thus letting him pay the tax when he has the money to do so. The resolution would also provide that the amount of taxable income to him as an employee should not exceed the actual amount received on the sale.

The House voted to adopt the Section's recommendations.

Customs Law Committee Opposes Havana Charter

Albert MacC. Barnes, Chairman of

the Committee on Customs Law, in his report for the committee, moved the adoption of the following resolution:

1. RESOLVED, That the Havana Charter for an International Trade Organization is hereby disapproved, and the Committee on Customs Law is hereby authorized on behalf of the American Bar Association to oppose in the Committees of the Congress the passage of the Ratification Bill known as H.J. Res. 236.

Mr. Barnes noted that the Board of Governors suggested the following addition to the resolution: "That the Standing Committee on Commerce and the Section of Corporation, Banking and Business Law be included in the authorization to present these views to Congress, and that the President shall be authorized to select the representative or representatives from these three groups to appear before the proper Congressional committee." He said that he accepted the addition. He also noted that the committee had called attention to the dangers of the International Trade Organization in 1947, and that in 1948 the Committee on Commerce and the Section of Corporation, Banking and Business Law also had decided to oppose the ITO. The House voted to adopt the resolution.

Mr. Barnes' second resolution was as follows:

2. RESOLVED, That the Committee on Customs Law is hereby authorized and directed to continue its study of the proposed federal legislation affecting the Customs Administrative Laws, and to oppose before any Congressional Committees any such legislation as in the Committee's opinion may contain matter abolishing, limiting or restricting complete judicial review in all customs administrative matters.

He explained that a bill was now pending in Congress that would destroy the right of review in customs valuation cases, and that this bill would be used, if enacted into law, to do the very things that the Association has disapproved in opposing the International Trade Organization Charter. The House voted to adopt the resolution.

The third resolution offered by the Customs Law Committee and adopted by the House was as follows:

3. RESOLVED, That the Committee on Customs Law is hereby authorized and directed to further study the provisions of H.R. 6834 ("Point IV Legislation"), with particular attention to whether that proposed legislation contains matter which has been disapproved by the House of Delegates in the Havana Charter for International Trade Organization (I.T.O.), and to promptly report its findings to the Board of Governors of the American Bar Association.

"Missouri Plan" Is Growing

Morris B. Mitchell of Minnesota, Chairman of the Committee on Judicial Selection, Tenure and Compensation, reported for that committee. He said that the so-called "Missouri Plan" for selection of judges was making great headway throughout the country. He said that it was always necessary to conduct a long hard program of education to get the plan adopted, but that the committee is sure that eventually it will be put into effect throughout the country. He urged each member of the House to do as much as possible in his own state to get the plan adopted.

Speaking for the Committee on Unauthorized Practice of the Law, John D. Randall of Iowa, the committee chairman, reported reactivation of the National Conference Group of Accountants and Lawyers in New York. He reported that a conference with the trust members of the American Bankers Association had recognized that there should be published a statement in the trust magazines calling attention to the fact that advertisements of trust companies often overemphasize the qualifications of trust officers to handle legal matters and ignore the function of the lawyer in the matter of estate planning. He reported that a conference with life underwriters had also issued a statement recognizing the fact that lawyers should be consulted in estate planning. This statement will also be published in the life underwriters' magazines through-

out the country, he said. The underwriters were very cooperative, and the general counsel of some of the largest insurance companies have agreed to send out instructions to their agencies about the necessity for consulting a lawyer.

Upon Mr. Randall's motion, the House adopted the following resolution:

That the Standing Committee on Unauthorized Practice of the Law be authorized to consent to an increase in the Conference Committee on Adjusters from "ten members, five of whom shall be representatives of the American Bar Association and six of whom shall be representatives of insurance interests," and that the additional lawyer representative from the American Bar Association shall be a representative of the Standing Committee on Unauthorized Practice of the Law of the American Bar Association.

W. E. Stanley of Kansas, Chairman of the Ways and Means Committee, gave his report. He said that there was \$143,756.87 in the building fund. He urged the members of the House to become patron members of the Association, remarking that the Class B Patron Membership costs no more than many labor unions charge their members as dues.

David A. Simmons of Texas said that he thought it was a mistake to divide membership in the Association into Class A and Class B members. Mr. Stanley replied that that had been the terminology adopted by the Board of Governors, and that the committee was merely proceeding along the lines set by the Board.

In the absence of members of the Committee on Restoration of Inns of Court, the Secretary moved that the following resolution be adopted:

That the campaign to raise funds to aid in restoration of the Inns of Court be closed and the cash on hand paid over to the appropriate authorities of the Inns of Court in London to aid in restoring the three buildings for which the appeal was made, namely, Middle Temple Hall, Temple Church, Gray's Inn Hall, or any of them.

The motion carried without debate.

In the absence of the chairman of

the committee, Loyd Wright of California reported for the Committee on Public Relations. He said that he doubted whether anything was more important for the Association and the profession than a good public relations program. He said that the committee's plans were too long for a detailed account, but that it was significant that many state bar associations were making public relations their primary objective.

The House then recessed.

FOURTH SESSION

■ Chairman Morford called the House to order at 1:45 P. M.

Alfred J. Schweppe, Chairman of the Committee on Peace and Law Through United Nations, said that his committee had no resolutions to offer. He reported that the committee's representatives had met with representatives of the State Department to discuss the Genocide Convention and the Covenant on Human Rights, and had appeared before the Senate subcommittee that is conducting hearings on the Genocide pact.

Walter P. Armstrong of Tennessee, Chairman of the Committee on Jurisprudence and Law Reform, proposed the following resolution:

I. RESOLVED, That it is the sense of the American Bar Association that the Congress should propose and the legislatures of the states should ratify an amendment to the Constitution of the United States of America as follows:

Section 1. The Supreme Court shall be composed of the Chief Justice of the United States and eight associate justices in regular active service.

Section 2. The Chief Justice of the United States and each associate justice of the Supreme Court shall cease to be an active member of that court when he shall have attained the age of seventy-five years, but shall become an inactive member of the court and receive all the emoluments of his office.

FURTHER RESOLVED, That the Committee on Jurisprudence and Law Reform, jointly with the Committee on the Federal Judiciary, be and hereby is directed to advocate the introduction and adoption of such an amendment to the United States

Constitution by all appropriate means.

He said that this proposal had been before the House several times in the past, and that he thought that all were familiar with the arguments pro and con. The House voted to adopt the resolution.

The next resolution proposed by Mr. Armstrong also dealt with a constitutional amendment concerning the Supreme Court. It reads as follows:

II. RESOLVED, That it is the sense of the American Bar Association that the Congress should propose and the legislatures of the states should ratify an amendment to the Constitution of the United States of America as follows:

No person hereafter becoming Chief Justice of the United States or Associate Justice of the Supreme Court shall be eligible to the office of President or Vice President while in regular active service or within five years after ceasing to be in regular active service of Chief Justice of the United States or Associate Justice of the Supreme Court.

FURTHER RESOLVED, That the Committee on Jurisprudence and Law Reform, jointly with the Committee on the Federal Judiciary, be and hereby is directed to advocate the introduction and adoption of such an amendment to the United States Constitution by all appropriate means.

Samuel H. Liberman of Missouri, speaking in opposition to the resolution, said that he thought it a mistake to incorporate into the organic law of the land a provision that would deprive the people of the opportunity to select as President a man whom they considered eminently qualified. He recalled that in at least one election, the people would have been deprived of the opportunity of voting for "a distinguished lawyer, a distinguished judge and a distinguished American" had this amendment to the Constitution been in effect. The Constitution ought to be limited to a statement of the fundamental principles of government, he declared.

Frank W. Grinnell of Massachusetts, speaking for the resolution, said that there was a time in 1872 when there were three members of the Su-

preme Court who were known to be aspirants for the Presidency. "It seems to me," he said, "that if a man is appointed to that Court, his ambition should be curbed, in the major interests of the public. There must be somebody else besides the members of that Court who are eligible and capable. . . ."

In reply to a question put by Benjamin Wham of Illinois, Mr. Armstrong said that the length of the period of ineligibility was not of great importance, but that five years had been chosen as a good average.

The House then voted to adopt the resolution.

The Committee's third resolution would have put the Association on record as not supporting any proposed amendment to the Constitution requiring membership in the Bar of the United States Supreme Court as a qualification for membership in the Court. He said that the committee felt that such membership in the Bar of the Court was not in itself a sufficiently stringent qualification to serve an effective purpose.

Lloyd Wright Proposes Substitute

Lloyd Wright of California moved that a substitute for the committee's resolution be adopted. His resolution would require members of the Court to serve as judges in the lower federal courts, to have practiced law for fifteen years prior to appointment, or to have served for fifteen years immediately prior to appointment as judges of courts of general jurisdiction in the states. He said that both major parties had used the federal judiciary as a "political football", and that appointments to the Federal Bench often were political rewards. He called the committee's proposal "a piecemeal measure".

Judge Floyd E. Thompson of Illinois said he agreed with Mr. Wright that the Association should not advocate a piecemeal measure, and that the matter should have very careful consideration.

David F. Maxwell of Pennsylvania

moved that Mr. Wright's substitute resolution be tabled. This was voted down by the House.

Judge Thompson then moved that Mr. Wright's proposed substitute resolution be referred to the committee for study and report at the September meeting of the House.

Speaking in favor of this, Albert E. Jenner, Jr., of Illinois said that the committee's proposal covered only one phase of the whole important subject and that it deserved to have more consideration.

Judge Thompson said that he had no objection to a suggestion by Whitney North Seymour of New York that the problem be referred to the Jurisprudence and Law Reform Committee and to the Committee on Federal Judiciary jointly.

Mr. Grinnell said that both those committees had reported before on the subject and that the House had then referred the matter to one committee. Nothing was to be accomplished by referring the resolution to two committees, he said.

Mr. Armstrong said that the committee was not at all opposed to Mr. Wright's proposal and would appreciate having it referred to the Committee for report in September.

Judge Thompson said that he thought that the committee should consider a provision providing for inactive judges of the Court being called into service when there is not a quorum on the Court.

The House then voted to adopt Judge Thompson's motion to refer Mr. Wright's proposal to the committee.

Committee Requests Extension of Time

Mr. Armstrong then said that the House had referred to his committee a proposal by the Insurance Section to amend Rule 25 (b) of the Federal Rules of Civil Procedure for report at this meeting. The committee wanted more time to study the matter, he said, and he moved that the directive of the House to report at this meeting be extended to the Annual Meeting in September. The House voted in favor of the motion.

The next resolution proposed by Mr. Armstrong reads as follows:

RESOLVED, That the American Bar Association approves and advocates the enactment into law of H.R. 6975 introduced in the 81st Congress, entitled, "A Bill to Amend Title 28, United States Code," and directs the Committee on Jurisprudence and Law Reform, jointly with the Special Committee on Court of Claims to advocate its passage in the Congress of the United States by all appropriate means.

He explained that this bill would make the Court of Claims a court of record established under Article III of the Constitution, and that the Chief Justice of the United States might designate any circuit or district judge to sit temporarily upon the Court of Claims.

In reply to a question of John Dashiell Myers of Pennsylvania, Carl McFarland of the District of Columbia said that the Court of Claims had already adopted the Federal Rules of Civil Procedure in so far as possible for it to do so and the proposed bill would make no change as to the Rules.

The House voted to adopt the resolution.

Committee on Military Justice Makes Report

John McL. Smith of Pennsylvania, speaking for the Committee on Military Justice in the absence of the committee chairman, moved that the following be adopted:

WHEREAS, the most important recommendation of the War Department's Advisory Committee on Military Justice dated December 13, 1946 urged the removal from Command of the power to dominate courts martial; and

WHEREAS, on September 26, 1947, February 21, 1948, February 2, 1949, and September 7, 1949, this Association has reiterated its belief that a true reform of Military Justice can be effected only by eliminating command control of courts martial; and

WHEREAS, the pending Uniform Code of Military Justice, which fails to eliminate command control, has now been enacted by both the Senate and the House of Representatives of the United States Congress; and

WHEREAS, such Uniform Code of

Military Justice provides for a United States Court of Military Appeals, consisting of three judges to be appointed by the President of the United States by and with the consent of the Senate; and

WHEREAS, its sponsors, both in Congress and in the executive departments, have stated their belief that the recommendations of the War Department's Advisory Committee on Military Justice, and of this Association, for express elimination of command control are made unnecessary by reason of the establishment of the United States Court of Military Appeals and the expectation that such Court will constitute a real and compelling check upon the exercise of command control; and

WHEREAS, the judges of the United States Court of Military Appeals, in addition to their judicial responsibilities, are entrusted by law with the further function of annually reviewing the administration of military justice, and making recommendations to the Congress for further improvements in military justice; and

WHEREAS, the United States Court of Military Appeals can only constitute an effective check on the exercise of command control, and can only act to bring about the elimination of the evils which have become evident if it is composed of judges who are completely independent of and not subservient to the military establishment, and who possess the character, abilities, and specialized knowledge which our Association and our profession commonly look for in judges of the courts of the United States;

NOW, THEREFORE, BE IT RESOLVED, that the American Bar Association again approves the proposition that an administration of Military Justice wherein the courts may be dominated by Command has too often proved to be a means of subverting justice and should not be tolerated or continued as a part of a system of military justice; and be it further

RESOLVED, that for and in the name of this Association, its appropriate officers, governors, delegates and members, its Special Committee on Military justice, and its Committee on the Judiciary be authorized to do all acts and things necessary and proper, including consultation with the President of the United States, the Secretary of Defense, and the Attorney-General of the United States, and including appearance before Committees of the Congress, to insure the nomination and confirmation of such persons as judges of the United States Court of Military Appeals as they, after investi-

gation, deem to be competent and specially qualified for appointment as such judges, and to oppose the nomination and confirmation of such persons as they, after investigation, deem to be unfit or not sufficiently qualified for appointment as judges of the United States Court of Military Appeals; and be it further

RESOLVED, that for and in the name of this Association, its President be authorized to tender to the President of the United States, the Secretary of Defense and the Attorney-General of the United States, and the Chairmen of the Committees on the Armed Services and the Judiciary of the United States Senate, the good offices of this Association and of its Committee on the Judiciary, and its Special Committee on Military Justice, in conjunction with the appointment and confirmation of judges of the United States Court of Military Appeals.

Mr. Smith said that it was felt that the Court of Military Appeals would help greatly in the solution of the problem of separation of courts martial from command, one point that was not covered in the Uniform Code of Military Justice.

A Substitute Resolution Is Proposed

John R. Snively of Illinois proposed a substitute resolution for that of the committee. His resolution would have placed the Association on record as favoring the Uniform Code of Military Justice. The Chairman of the House ruled that the Code was not before the House, and that Mr. Snively's motion was out of order. The House voted to sustain the ruling of the chair, and then voted to adopt the resolutions offered by the Committee on Military Justice.

James E. Brenner of California, reporting for the Survey of the Legal Profession, said that twenty-three final and preliminary reports had been completed in the Survey, and that sixty-four other reports were being prepared. Most of the reports will be completed this year, he said.

Milton J. Blake of Colorado, reporting for the Committee on Legal Services to the Armed Forces, of which he is chairman, said that the committee was making plans for the contingency of war. He gave as an

example the work of bringing up to date the compendium of state laws for the use of legal assistance officers of the Armed Forces.

James D. Fellers, Chairman of the Committee on Draft, then made his report. He said that the first resolution considered by the committee was offered by Charles S. Rhyne of the District of Columbia, and reads as follows:

RESOLVED, That the House of Delegates approves S. 3108 entitled, "A Bill" to provide for payment of an annuity to widows of judges, introduced by Senator Pat McCarran on February 24, 1950, and which bill is also to be introduced to the House of Representatives; and be it further

RESOLVED, That copies of this resolution be sent to the Honorable Pat McCarran, Chairman of the Senate Committee on the Judiciary and the Honorable Emanuel Celler, the Chairman of the House Committee on the Judiciary.

Mr. Fellers said that this bill had been instigated by the Department of Justice and had been approved by the Association's Section of Judicial Administration. He moved the adoption of the resolution.

The House voted in favor of the resolution.

The next resolution presented by the Committee on Draft was proposed by John R. Snively of Illinois. It expressed opposition to the advertisements of the Great Atlantic and Pacific Tea Company, published throughout the country, concerning the antitrust suit filed by the Government against the company. Mr. Fellers said that the Committee on Draft felt that the advertisements were an attack on the Government's antitrust policy and not an attack on the legal profession.

Mr. Snively was then recognized to move the resolution. He said that the advertisements were attacks upon the legal profession—he declared that none of them mention the Government, the Attorney General or the Administration, but rather each is directed against the "antitrust lawyers". He said that the advertisements

were misleading and were an attempt to influence the court.

Marcus C. Redwine of Kentucky, President Elect of the Kentucky State Bar Association, was given unanimous consent to address the House in favor of the resolution. He told of his experience when he inquired of the company about the advertisements, and said that he thought it would desist if the House adopted the resolution in opposition to the company's action. He said that if one group was allowed to "jump on" antitrust lawyers, other groups of lawyers might be next. He said that he thought the members of the profession should take action to stop the attacks upon them.

Whitney North Seymour of New York said that he perceived that the sentiment of the House was against the resolution, and that he thought it might be misconstrued if the resolution were voted down. He therefore moved that it be tabled, and the House voted to do so.

Third Resolution Referred To Ethics Committee

The third resolution presented by Mr. Fellers was offered by Cuthbert S. Baldwin and LeDoux R. Provosty of Louisiana. It contained quotations from briefs filed by the Solicitor General, and recited that the Solicitor General had directly attacked and criticized the justice, fairness and efficiency of certain United States

courts and the judges thereof. It called for an investigation of the matter. Mr. Fellers said that some members of the Draft Committee felt that the matter had been magnified out of proportion but that it was recognized that a situation does exist that may demand some attention. Accordingly, he moved that the resolution be referred to the Committee on Professional Ethics and Grievances. Mr. Baldwin concurred in this, and the House voted in favor of the motion.

Mr. Fellers read a fourth resolution, which he said had come to him in a *sub rosa* manner, which proposed that the next Mid-Year Meeting of the House be held in Houston, Texas, at the Shamrock Hotel, since the wives of the members had taken in all Chicago has to offer and desire a new scene of operations. The House could take no action on the matter since it was uncertain who had the proper jurisdiction, Mr. Fellers explained, amid laughter and applause.

Donald A. Finkbeiner of Ohio, Chairman of the Committee on Hearings, reported. John Marshall College of Law, Jersey City, New Jersey, requested provisional approval of the Association, appealing from a refusal to grant such approval by the Council of the Section of Legal Education and Admissions to the Bar. Mr. Finkbeiner said that a full hearing had been granted, and that the Committee on Hearings recommended affirmation of the Section of Legal Edu-

cation's action. The House voted to adopt the report of the Section.

James E. Palmer, Jr., of Virginia, speaking in behalf of the Federal Bar Association, addressed the House. He complimented the Committee on Unauthorized Practice of the Law for its fine work, and said that an investigation had been conducted by the Federal Bar Association to determine what could be done within the Federal Government itself about unauthorized practice. He said that it is on occasion the practice of government attorneys to tell citizens consulting them, "You don't need a lawyer." He said that his Association was aware of the problem, and intended to cooperate in every way with the Unauthorized Practice Committee.

Secretary Stecher read an additional report of the Board of Governors. The Secretary of the Judiciary Committee of the Senate had asked the Association to submit an opinion as to the constitutionality of the Mundt-Ferguson-Johnston Bill, a redraft of the Mundt-Nixon Bill. The Committee on Bill of Rights had submitted a report on this, Secretary Stecher said, and the Board of Governors recommended that the House authorize the Committee to transmit the report to the Chairman of the Judiciary Committee. The House voted to adopt the recommendation.

The House then adjourned at 3:40 P. M.

Mr. Justice Holmes

(Continued from page 264)

is without meaning or *Ought*, in which the ultimate reality is force, and which is populated by beings essentially indistinguishable from baboons or grains of sand, there can be no morals in the real sense of the term. Another point of confusion lies in Holmes' misunderstanding of the relation between morals and law.

Over and again he complains of the error of "deducing" laws from moral principles. The life of the law is not logic, he says, it is experience. One may not *deduce* a whole set of positive rules from some ideal absolutes. The answer is, of course not. But the answer is also that it was only the grossest caricature of the natural law which gave rise to such a claim and that a real acquaintance with the doctrine would have demonstrated

that a positive law is the *determination* of a particular application of a natural moral principle, not a *deduction* from such a principle. A positive law is a realization of a principle of justice achieved by relating it to the facts and circumstances of a given environment, and it therefore possesses the relativity and changeability that are characteristic of the environment. Pollock attempted to correct Holmes on this

issue, but Holmes stood his ground. In view of his gross misconception of the moral order, perhaps it was too much to hope that his concept of the relationship between law and morals could be any better.

On the whole, therefore, Holmes' legal theorizing, while containing some language indicative of an ultra-positive norm, remains essentially "realistic" in the modern connotation that law is fact explainable in terms of popular will.

A Difficult Problem of Interpretation

If we turn from his lectures, speeches and articles to his judicial statements and judgments, we are confronted with another difficult problem of interpretation. There were two aspects of his judicial thought. According to one aspect, his doctrine was a natural reflection of his amoral legalism and of his romantic concept of life as struggle, even meaningless struggle. It was a judicial *laissez faire*. The propriety of legislation was for the legislature, not for the courts. This was true even though the legislation was "shocking" or "noxious" to him. This of course was consistent with his doctrine of law as will, what the crowd wants. It is also consistent with the Spartan quality in Holmes' disposition. The latter was well described by the late Professor Morris R. Cohen, who described himself as "a grateful and admiring friend" of the Justice. Professor Cohen said that Holmes' liberalism was compromised by his economic backwardness which he got from the classical economists and also by the influence upon him of Malthus and Darwin, and he added, "Indeed, for a thoroughly civilized man, which Holmes was in the best sense of the word, he shows a remarkable absence of sympathy or compassion for the sufferings and frailties of mankind. His morality is thoroughly pagan or Stoic in that respect. His emphasis is on the pagan virtues of courage, temperance and justice, without any reference to the Hebrew-Christian view of God the Father, who is compassionate in His love for all men and sends down

the beneficent rain on the just and the unjust alike. He is thus too ready to invoke the penalty of death in his theory of justice, and can think of no better remedy than the abuse of ownership than the crowd will kill the man guilty of abusing the goods which the multitude needs." In another place, Professor Cohen said that Holmes' *laissez faire* was the product of his "militaristic philosophy" and of his belief "that the important thing is to build a strong race." At all events, Holmes thought little good could be accomplished by tinkering at social reform, especially by law.

Another Aspect of His Judicial Thinking

But there was another aspect of his judicial thinking, in accordance with which he tested statutes by their reasonableness and justice, and although he usually upheld them he was not averse to striking them down, as in the case of a statute regulating coal companies (*Pennsylvania Coal Company v. Mahon*, 260 U.S. 393). Indeed, he once complained "that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage." More than that, he said, "The result of the often proclaimed judicial aversion to deal with such considerations [of social policy] is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious. . . ." The question at once arises, how can this be reconciled with the judicial *laissez faire* so often asserted by him? If law was what the majority wanted, even though shocking or noxious, if social policy was for the legislature and not for the courts, what justification was there for a court passing upon social policy or the validity of a statute?

His Work as Judge Repudiated Some of His Theory

Max Lerner struggles with this question, but without any solution that I can discern. I think the reason is that there was a real inconsistency in Holmes' thought on this subject, and

that in his work as a judge he actually repudiated some of the nihilism of his legal theory. His theorizing has been depicted above. Let us now look at his judicial work. The typical situation which he faced was a legislative exercise of police power, sometimes by Congress, usually by a state. His doctrine was that the legislature could do anything which was not expressly prohibited by the Constitution. The usual question was whether the statute under consideration violated the Due Process Clause of the Fifth or the Fourteenth Amendment. It may have been an act regulating wages or hours of labor, or the use of trucks on highways, or the right of parents to choose a school for their children, or some other aspect of our daily life. The question presented to the Court was whether the regulation was a valid exercise of police power or whether it deprived a person of "life, liberty, or property, without due process of law". And this "due process" included substantive as well as procedural rights. As stated by the Supreme Court, it included those "immutable principles of justice which inhere in the very idea of free government" (*Holden v. Hardy*, 169 U.S. 366, 389), those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U.S. 312, 316), and those immunities "implicit in the concept of ordered liberty" (*Palko v. Connecticut*, 302 U.S. 319, 325). In other words, it included the whole gamut of natural justice. It was a far cry from the jungle-toothed realism of "what the crowd wants". It was that very natural law that was rejected by Holmes' philosophy. It was the doctrine that was refused a place in the law as an implied limitation on legislative power, but that reentered the law in the express garb of due process.

And Holmes accepted it as such. For example, in one of his greatest dissents, he said, "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can

be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." (*Lochner v. New York*, 198 U.S. 45, 76. Italics supplied.) And in another case, as indicated above, he based his decision on "fair play" and "substantial justice". (*McDonald v. Mabee*, 243 U.S. 90, 91, 92.) Moreover, he distinguished between claims which deserve protection under these fundamental principles and those which do not. He held that due process was not infringed by a law that forbade the use of any language in the schools but English (*Meyer v. Nebraska*, 262 U.S. 390), but he joined without dissent in a decision nullifying a statute that would have required all children to attend the public schools and that would therefore have outlawed parochial schools (*Pierce v. Society of Sisters*, 268 U.S. 510).

Natural Law Doctrine Projected in His Work

The only solution I can make of the difficulty is that in spite of the rejection of the natural law by Holmes in his philosophy, the doctrine projected itself through his work as a judge. And it did that because it is inherent in human reason. Men may talk the language of the jungle, but they act like human beings. Holmes' action was a judicial *can't-help*. He was bound by his judgments as a reasonable man. Thus in a Massachusetts Supreme Court decision he said, "If I assume that . . . speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so." (*Commonwealth v. Perry*, 155 Mass. 117, 28 N.E. 1126, 1127.) This does not relieve Holmes of inconsistency. Even his ardent apologists do not attempt to relieve him of that. Thus Mr. Lerner says that it would take a bold man to say that the strains of

legal realism in Holmes "are not balanced by strains of traditionalism rather than change, of belief rather than skepticism". And Mr. Biddle: "Contradictory? Certainly, [Holmes] would have answered, but so too is life full of contradictions." So, on the issue of a moral basis of law, Holmes was more "practical" than his philosophy, and he had some judicial *can't-helps*. On the bench he applied the *can't-helps* instead of the philosophy, and American law enjoyed an escape from disaster.

What Is the Secret of Holmes' Popularity?

I return to the secret. What is the basis for the lavish popularity of Mr. Justice Holmes?

Perhaps it would be fitting to mention first some personal characteristics. He was a child of fortune: born of a distinguished family; tall, handsome, romantic; and a hero of the Civil War. "His conversation and bearing", says Cohen, "were like rare music that lingers in one's memory." Added to these qualities were his extraordinary health and vigor, which enabled him to remain active on the Court until his ninetieth year and to live until his ninety-fourth.

He was a talented writer. His opinions have a sharp thrust, a sure touch, a mastery, brevity, simplicity, pithiness and axiomatic phrasing, an avoidance of verbiage and irrelevance, an originality and freshness that are the despair of his imitators, of whom there have been several. The result is that he continues to live in his phrases, which are standard quotations in legal literature: "clear and present danger"; "The common law is not a brooding omnipresence in the sky"; "The life of the law has not been logic: it has been experience".

His extrajudicial writings, too, have survived, at least until now. In general they reflect the underlying nihilism of his thinking upon fundamental subjects and his leaning toward a Darwinian evolutionism in place of a personal destiny. Some of them cloak an essential tawdriness of

content with a lyric style. One of these may bear quoting. It is the conclusion of an address to the Harvard Law School Association of New York in 1913. He says,

"If I am right it will be a slow business for our people to reach rational views, assuming that we are allowed to work peaceably to that end. But as I grow older I grow calm. If I feel what are perhaps an old man's apprehensions, that competition from new races will cut deeper than working men's disputes and will test whether we can hang together and can fight; if I fear that we are running through the world's resources at a pace that we cannot keep; I do not lose my hopes. I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead—perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.

"The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the Götterdämmerung will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars."

In the realm of the common law, Holmes had immense learning. His lectures on that subject, which constitute his only book, are an evidence of his love, as well as of his mastery of it. The only blot on his record as a legal historian is his deprecation of the Roman law, for which Pollock chided him. In common law, however, few have equalled him.

Holmes' Dissents Vindicated by Time

As a Supreme Court judge, his fame rests upon that most popular of all foundations, vindication by time. During his tenure of office, the majority of the Court was engaging in what Roscoe Pound called a "carnival of unconstitutionality". Utilizing the newly-discovered due process clause, it nullified statute after statute designed to curb the evils of economic *laissez faire*. Individual rights of property and of contract prevailed over social interests. Furthermore, due process was not limited to persons; it was held to protect corporations as well. The result was that the great majority of decisions involved the interests of corporations rather than of persons. The West was being built. Big investments were made by great corporations. The states began to regulate these companies in the interest of employees and consumers. Represented by the best legal talent, the companies rushed to the courts for protection against measures which threatened their objectives. The Supreme Court substituted its economic and political theories for those of the legislatures and destroyed the legislation. In protection of property, it nullified utility rates fixed by commissions. In protection of liberty of contract and of calling, it invalidated minimum wage laws and a statute which prohibited employment in a bakery more than ten hours a day or sixty hours a week and statutes prohibiting yellow-dog contracts by which a laborer became ineligible for employment by belonging to a union.

Against such decisions, Holmes wrote his famous dissents. As seen, his action was not due to any tender-

ness for the personal element, but to his doctrine that social policy was for the legislatures, not the courts. In an age that has gone to the other extreme, that has replaced frontier individualism with a cradling security, it is not surprising that Holmes is popular. Regardless of whether he would have liked the paternal legislation—he probably wouldn't—his dissents have triumphed as fixing the boundaries of judicial action, and therefore he is the logical hero of the day. The irony of it is that it was the reactionary spirit of those against whom he contended, rather than any ingrained liberalism of his own, which provided him with the triumph. But current history is a partial and a fickle judge. It acclaims those who provide the doctrine that facilitates its objectives. In that sense, Holmes above all others cleared the path in the federal courts.

Holmes' Philosophy Is Congenial to Our Era

But what of his agnosticism and his philosophy of force and violence? What of his approval of law as will rather than reason? What of his dehumanizing man by his scorn of the essence which separates a person from brutes or clods of earth? What of the ignorance of purpose in life and the romantic, Hegelian exaltation of struggle and headship and command? Surely, such a philosophy would cut out from under us the very basis of the freedom and justice that we hold so dear. And surely lawmakers would seek in vain for any criterion of justice in a philosophy such as that. How, then, can a man be a national hero when his ultimate view of things strikes at the very principles on which our society was founded and rivals the thinking of those who would destroy us?

The answer lies in the simple fact that in the high realm of the intellect we have lost our principles. Holmes' agnosticism does not repel. On the contrary, Holmes is an agnostic prophet to an agnostic age. His bottomless relativism fails to create a reaction because in an age that denies the validity of any form of

knowledge but the tentative findings of the positive sciences that relativism possesses the glamour of a war cry. This relation of Holmes to his age is well summarized by Max Lerner, who says, "The fact is that Holmes's 'bad man' standard, his rejection of natural law, and his definition of law as what the courts will in fact do, were all congenial to the mood and quality of a pragmatic America in whose practical business life the realm of fact had elbowed out the norms of morality."

The question naturally arises, which of the two will have the greater influence upon American life, Holmes the man and his decisions, or his philosophy? The answer is not difficult. In the long run, Holmes himself is not important. He is gone, and his personal influence, like that of every other man, will vanish. Even his decisions—whether this statute is valid, or that—will ultimately be buried in the stream of legal history. But a philosophy survives. In the final analysis, ideas command, for good or ill. As Holmes himself remarked, the abstractions of Descartes became a ruling force a century after they were made, and Kant rather than Bonaparte governs today.

Therefore the significant thing about Mr. Justice Holmes is not Holmes the genial, Holmes the charming, Holmes the romantic, or even Holmes the great and courageous judge. Those things are the stuff of biography and drama. The significant thing is that Holmes had a very bad philosophy, and moreover that that philosophy is congenial to our time. It is the latter fact—that Holmes' philosophy arouses few repercussions amongst us—that is the truly ominous thing and the end result of this study. For if we had not lost our principles, Holmes' voice would have been a negligible dissidence in our day. As it is, his philosophy is a symbol of our intellectual wretchedness, a conspicuous example of our abandonment of those spiritual, philosophical and moral truths that have been the life of the western

tradition, the foundation of our law and the strength of our Republic. I mean the recognition that it is a father-controlled world in the sense that infinitely above the strivings of men is the Providence of God; that men are *not* means to society but spiritual beings whose right to happiness conditions the good of society; that the *ultima ratio* is not force but a truth and goodness that are founded in the Creator and are reflected in the nature of man and society; that law is not a product of irresponsible will but a branch of ethics because its whole purpose lies in being an instrument for the common good.

Fire Insurance

(Continued from page 278)

holder from so-called "moral hazards" created and practiced by some of the supposedly responsible major concerns in alleged illicit practices bordering on "racket".

In many instances policyholders who have experienced complete losses, or unsatisfactory adjustment of losses, today raise the cry that when they in good faith bought insurance protection the concern with which they dealt actually was guilty of obtaining money (premiums) under false pretenses. This view grows out of experiences following consummation of a contract which ostensibly offers protection.

In the last decade fire insurance policyholders, to say nothing of those holding other forms of insurance, have noted an increasing arrogance on the part of company representatives in business negotiations. Some feel they have absorbed and reflect the "public-be-damned" attitude so prevalent among the bureaucrats and the disciples of absolutism in Washington. Company executives seem confident that insurance business philosophies can withstand any attack in our high tribunals, and that through the protection of a powerful and well-financed lobby in every important

In harmony with the fashion of the day, Holmes said that traditional thought is childish in looking for superlatives. Actually, that was the fault of Holmes himself, who made such extravagant demands of proof that he was left with impoverished convictions. If he had only ceased asking for thunderclaps and been a little quieter and a little humbler he might have found that his famous *can't helps* were not merely the indefeasible offspring of his own mind but the cosmic first principles of human reason.

The crisis of Holmes is the crisis of modern society. If modern society

legislative hall or bureau they can continue to do business under an antiquated, inequitable system which should have been overhauled and modernized decades ago.

Under state supervision, insurance companies in the past have thrived and strengthened their hold, influence and control of American business and its financing. They have been slow to correct abuses and have allowed in their ranks the spread of a vicious practice bordering on racket. Their fabulously fattened coffers have given them increased power and influence to maintain standards of doing business that are universally conceded to be out of step with the public's appreciation of ethics and equity.

Perhaps there is relief in sight for the down-trodden policyholder. An encouraging light recently has been thrown on the whole disputed subject, not only by those intent upon having the standard forms modernized and causing enactment of new and broader laws regulating insurance in the several states, but by leading figures of the insurance business who from time to time have voiced the necessity of reforms in insurance forums, meetings of bar associations and other bodies. They are men of wisdom and vision, and have seen the handwriting on the wall.

They are as keen to discourage any

does not solve it better than Holmes, then his dreadful philosophy may, as he himself said of all ideas, "one day mount a throne, and without armies, or even with them . . . shoot across the world the electric despotism of an unresisted power." If, on the other hand, we recapture without delay the perennial insight of the Judeo-Christian tradition, then the electric despotism which is already a fact may yet be stemmed, and we may resume that march of mind and spirit which is the glory of human history. That, if we would only realize it, would be a happy solution of the secret of Mr. Justice Holmes.

move toward federal control of insurance as are the sound American policyholders who patronize their concerns in good faith and fear any step that would lead to federalization of the insurance business.

Insurance companies are custodians of more than thirty billion dollars of the public's private funds, and policyholders today would not welcome any move that would place those funds in the hands of federal exploiters who already have demonstrated a questionable dexterity in juggling funds and too great an inclination to spend. They picture their vast resources converted into channels such as those that absorbed the old age pension, social security and other fabulous sums. In a word, they prefer to have private enterprise—the giant insurance business, one of the greatest concentrations of wealth in the world today—handle the trusteeship of their resources.

If the American insurance patron is to hold this view and sustain the position of the insurance trust through these trying times of threatened absolutism and our certain, if slow, return to sanity in government and business, then it would appear that the position of advocates of insurance reform is sound. They expect the cooperation of the leaders and policy formers of the industry in current moves to end abuses.

Uniform State Law Will Help

Undoubtedly, one of the greatest contributions in the move to correct abuses in fire insurance underwriting will come from the Conference of the Commissioners on Uniform State Laws. This select group of nationally-known attorneys and judges will consider suggested steps by its representatives in the forty-eight states to bring about uniformity of regulatory statutes and suggested changes in the standard forms of policies.

The changes under consideration are too numerous to review. All contemplate better protection of the interests of the insured, as well as reducing to understandable English the various provisions now shrouded in ambiguity, if not intentional deceit.

Overinsuring, one of the greatest evils of fire insurance underwriting, and a practice that seems to have universal approval of the underwriters, deprives policyholders of just returns in event of loss and adds immeasurably to the coffers of the insurers. In an effort to remove this hazard to the insured and put an end to the unethical practice of the insurers, a group of leading California insurance analysts have sponsored bills in the California legislature, seeking relief legislation by

amendments to the Insurance Code.

Advocates of insurance reforms in other states are watching with exceptional interest the progress of the California bills, confident that approval of the measure will expand into a nation-wide move to rewrite the Standard Fire Insurance Policy Form and bring about sweeping changes in regulatory statutes.

The proposed California measure would add a section to the Insurance Code of that state, and provide that in all suits brought upon policies of insurance against loss or damage by fire, the defendant [the insurer] "shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount by which the property is insured, the property may have sustained between the time of issuing the policy and the time of loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss, the measure of damage shall be that portion of the value of the whole property insured (ascertained in provisions provided), which the part injured or destroyed bears to the whole

property insured".

This move is typical of the nature of bills now passing through the legislative hoppers of the several states today as an aroused citizenry, abused too long by the arrogant insurance colossus, demands justice and equity in its dealings with one of America's greatest concentrations of wealth and power, the National Board of Fire Underwriters and hundreds of units making up that group.

Until relief is given the oppressed policyholder, it would behoove him to study carefully every word of present contracts offered him before accepting the supposed "protection", and watch for the pitfalls maintained by a blinded and grasping industry that must clean its house and correct its ways, or face certain regulation in Washington.

Providence spare us such a move, yet it looms as a certainty if the insurance companies delay a purge of their business ways. A quarter of a century ago an aroused public caused reforms in insurance practices. Under the able leadership of the late Charles E. Hughes the so-called Armstrong investigation cleansed American insurance and brought about needed reforms.

Can it be that another such inquiry will be required to correct present day evils of insurance?

Ross Essay

(Continued from page 292)

All of which is by way of saying that the practice of the law, like most other things, is not what it once was. Today, the attorney who is administering a railroad in receivership is practicing law as much as is the attorney replevying a horse. The fact is that "the law" has grown into such a tremendous factor in all our lives that there is no one and no thing unaffected and unmotivated by some of its ramifications. The reason for this is simple—laws are created by men to govern their relationships and contacts with each other. As those relationships and contacts be-

come more numerous, complex and subtle, so must the laws. As the laws become more numerous, complex and subtle, we observe a splintering of the practice of the law into specialties. Today's lawyer who would be a general practitioner must make up his mind that he will never equal the skill of the legal specialist in the specialist's field. The other side of this coin, of course, is that the legal specialist must resign himself to the fact that he will never have the broad ability to compose a solution to his problems by using the full scale of concepts and ideas which the general practitioner draws on.

One of the results of our creation

of this tremendous and intricately contrived code of legal conduct has been the formation of the great law firms of the nation, whose numerous members process a legal problem in much the same fashion that Ford makes a motor car. This is an expensive proposition, and perforce the client who can afford this sort of thing is not the ribbon clerk, but the corporation that manufactures the ribbon. This is something we should scrutinize carefully. Legal services, because they explore and adjudicate rights and moral responsibilities, cannot always be sold to the highest bidder, as can a case of toothpaste. In ratio as our profession

allows itself to become the hand-
maiden of "bigness", it will surely
undermine the foundation on which
it rests—the consent and good will
of the whole people. We lawyers have
erred in this direction in the past.
We may be eternally grateful, how-
ever, that we have had individual
lawyers, and law firms as well, with
discernment, who have realized the
great and peculiar responsibilities
laid on them, and who have given
their utmost in behalf of the "mil-
lions who, humble and nameless, the
straight, hard pathway plod".

Lawyer's Duty Is To Achieve Justice

There has been no perceptible clam-
or in America for "socializing the
lawyer". We may, in all candor, com-
pliment ourselves on this, because
the conclusion we may draw from it
is that in one hundred fifty years of
free practice of law in America there
have not been many who have been
turned back without representation,
not many who, because they lacked
funds, lacked a friend in court or a
word of counsel. This situation, let
us hope, will continue. We lawyers
must not evaluate our efforts or those
of our colleagues in terms of how
much money we make and keep;
rather, our respect and affection must
be saved for those lawyers and law
firms who are on the firing line day
in and day out, bringing justice
and understanding to those of our
people who are in trouble, doubt
and distress.

There are two fine old designa-
tions for members of our profession
which regrettably have very largely
passed into disuse. They are "coun-
sellor at law" and "advocate". These
names have significance because of
their being *descriptive*. Taken to-
gether, they pretty well sum up the
dual aspect of our profession and
provide a handy, thumbnail descrip-
tion of what our job is.

To counsel one's friends and neigh-
bors in the multifarious problems
that confront them is a great respon-
sibility. At times, it seems these days
that life's carrousel turns so fast that

we no longer hear the music and
enjoy the ride, but must use all of
our strength just to keep from being
pitched off. Today there is the in-
evitable cultural lag in the mental
and spiritual adaptation by our peo-
ple to their accelerated material and
scientific culture. Our people are,
consequently, uneasy and unsure at
times. They need the counsel of hon-
est men whose principles are rooted
in fundamental truths. It does not
matter whether these men be law-
yers or doctors or bartenders. So long
as they have inherent good sense and
a steady belief in basic principles,
they are eligible. In our own field,
counseling is a process we should
foster and encourage. It is, in a sense,
"preventive law". We should try to
make our clients understand that
they can get help from us more ef-
fectively and more cheaply before
they are in trouble, before the con-
tract is broken, or the wheel flies off.
This is the place of the counsellor at
law. Whether we call ourselves law-
yers, attorneys, barristers, or what-
have-you, let us train and equip our-
selves to counsel, for therein lies the
greatest opportunity to hold our fel-
low men to a steady course amidst
the distractions and confusions of
today.

Finally—something about our place
as "advocates". In the epic volumes
of man's history, the most bitter and
fruitless pages have been those in
which the mass of mankind wanted,
needed, but failed to find advocates
to fan into flame the sparks of in-
spiration and grandeur that smol-
dered among the people. The great-
est, most noble achievements of man
have resulted because of the presence
of advocates; not, assuredly, because
they were artificers who could formu-
late philosophies and doctrines and
impose them upon the people, but
rather because they could phrase and
render tangible the yearnings and
aspirations of the people and could
present them in a fashion which the
people recognized as their own crea-
tion. Thus was created the Magna
Charta, thus arose the great Protes-
tant religions, and thus were born our

own Declaration of Independence
and Constitution. These achieve-
ments are advocacy on a grand scale.
We should not let their heroic di-
mensions blind us to the fact that the
identical intellectual and spiritual
processes created them as create our
pleas for justice, compassion and
fairness in our daily practice.

If we in the legal profession find
through the years to come that we
must relinquish any of our preroga-
tives, that we are forced to abandon
some of the outposts which we have
captured for ourselves in the eco-
nomic and social structure, let us
defend to the utmost that great doc-
trine that every man, every cause,
every faith shall receive adequate
and just advocacy at our hands. If
we surrender this, we lose one of the
greatest principles on which we have
built this nation—that our people de-
serve to know all the facts all the
time, in order that they may use their
God-given minds and souls to reach
the right decision.

These things then, among others,
comprise the lawyer's list of things
to do today and tomorrow. Oliver
Wendell Holmes, Jr., shortly before
his death reflected that, "The riders
in a race do not stop short when
they reach the goal. There is a little
finishing canter before coming to a
standstill. There is time to hear the
kind voices of friends and to say to
oneself, 'The work is done.' But just
as one says that, the answer comes,
'The race is over, but the work is
never done while the power to work
remains.' The canter that brings you
to a standstill need not be only com-
ing to rest. It cannot be while you
still live, for to live is to function.
That is all there is to living."

Do the things we have talked about
help solve the problems as to the
lawyer's place and function in soci-
ety? Possibly not, but they do rep-
resent something to work at—some-
thing to live for. If we genuinely
hold and honestly practice these prin-
ciples, we will leave a legacy to those
who will follow us of a humane and
vital jurisprudence in a nation which
is strong and free.

Melville Weston Fuller

(Continued from page 296)

Chief Justice. He had served on that Court for seventeen years when, in 1881, he was appointed (by almost universal demand) to the Supreme Court of the United States.

Gray's forte was historical legal research—he loved to cite the Year Books. He had a prodigious and accurate memory of the thousands of cases which he had read, reported or decided. It was suggested that his relation to Justice Miller was like that of Story to Marshall—that is, Gray found a basis in legal history for Miller's intuitive decisions. Gray was an indefatigable worker; his devotion to the law was like that of "a holy priest to his religion." He had a great capacity to synthesize the ideas of others—in his seventeen years on the Supreme Court of Massachusetts, he had written only one dissent. He was the first Justice of the Supreme Court of the United States to employ a legal secretary and a new secretary joined him in October, 1888, as Fuller took the oath. This young man, Samuel Williston, has since become the great authority on the law of contracts. In his autobiography, Professor Williston says: "Judge Gray was more than tolerant. He invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views." But Williston was not successful in his efforts to get Gray to dissent in Fuller's first important case. Williston afterwards wrote a law review article to criticize the decision.¹⁵

Gray was six feet four in height and had a serious but boyish face. A few months after Fuller became Chief

Justice, Gray was married for the first time at the age of sixty-one to the daughter of his colleague, Justice Stanley Matthews, who had died a short time before. Williston tells a story which portrays the judicial mind in love. The secretary was also engaged to be married and one day the Justice showed him a ring and said: "You, being if I may say so, *in consimili casu*, can perhaps tell me whether this would be likely to please a young lady." Gray's marriage (inside the Court family, so to speak) was a great success,—to the delight of all his colleagues, including the Chief Justice.¹⁶

Fuller's skill in avoiding acrimony in the conference room immediately aroused Gray's admiration. He sometimes told Williston after returning from a Saturday conference that the discussion had been heated but that the Chief had kept the Court from flying apart.¹⁷ Since Gray had been a Chief Justice in Massachusetts, he could appreciate Fuller's diplomacy. The Court then consisted of highly individualistic men of great pride of opinion and Fuller's capacities as a conciliator were much needed. He inaugurated a custom, which has prevailed on the Court to this day, of requiring each Justice to greet and shake hands with every other Justice each morning. This practice tends to prevent rifts from forming.¹⁸

Fuller came to rely heavily on Gray's scholarship and Gray in turn recognized Fuller as a resourceful lawyer of vast practical experience.

The work-horse of the Court when Fuller came to it was Justice Samuel Blatchford. Born in New York in 1820, he had graduated at the head of his class from Columbia College in New York and had been secretary

to Governor Seward and later the Governor's law partner at Auburn. Then he had formed his own law firm in New York with Seward's nephew as his partner. In 1867 he had been appointed District Judge for the Southern District of New York, and five years later, Circuit Judge. He was also the Reporter of Blatchford's Circuit Court Reports containing, among others, his own opinions, by which he came to be held in high esteem, especially in maritime and bankruptcy cases. He was appointed to the Supreme Court in 1882. His specialties were admiralty and patent law and his reputation was for industry rather than brilliance. In the first three years of the Fuller regime he wrote more opinions than any other Justice—even more than the Chief Justice. He was the only Justice during that period who wrote no dissenting opinion.¹⁹

Fuller and Blatchford Shared Admiration of Seward

Fuller and Blatchford had a focus of interest in their mutual regard for Governor Seward. Fuller had apparently reported for the *New York Herald* portions of Seward's campaign trip to the West in 1860. At any rate he had collected many books by and about Seward.²⁰ Fuller early took occasion to write Blatchford about Seward's reference to the Justice in Seward's published letters. Blatchford responded: "Seward refers to me several times in his letters. The occasion you refer to was when I resigned, in Sept. 1841, my place as his Secretary after having been with him since January, 1839. Thanks for your kind words. Your friendship is highly valued and reciprocated."²¹ Soon the Chief Justice and Justice Blatchford were attending dinners at

15. *Washington Central Bank v. Hume*, 128 U. S. 195 (1888).

16. Fuller to Bancroft Davis, July 26, 1890, Bancroft Davis papers, Library of Congress.

17. Interview with Samuel Williston. And see Williston, *Life and Law, An Autobiography* 94-95.

18. Bert Andrews in the *New York Times* of June 16, 1946. Mr. Andrews had the story of Fuller's inauguration of this practice from Mr. Justice Frankfurter and Charles Elmore Copley, the present Clerk of the Court.

19. See tabulation in Mayes, Lucius Q. C. Lamar 547 and Blatchford's compilation in Fair-

man, *Mr. Justice Miller and the Supreme Court* 387.

20. Some of the articles in the *Herald* covering Seward's campaign trip to Illinois, Wisconsin, Minnesota, Kansas and returning to Springfield, Illinois, seem to be in Fuller's style. Fuller's library at Bowdoin contains a shelf of books by and about Seward—a peculiar interest in Fuller, unless based on personal experience, in view of his early strong anti-Republican bias. I have tried for many years to secure direct evidence of Fuller's authorship of these Seward articles in the *Herald* but without success. The circumstantial evidence how-

ever is strong. He wrote some articles for the *Herald* at that time. He bought many books about Seward. Furthermore, the Springfield article of October 16, 1860, published on October 20, 1860, states that Seward would not have stopped at Springfield except that his failure to do so would be misconstrued. Fuller wrote Lamont in 1887 a peculiar letter to the effect that Cleveland's failure to stop at Springfield to visit Lincoln's tomb would be misconstrued. Fuller to Lamont, September 23, 1887, Genet papers.

21. Blatchford to Fuller, June 22, 1891, Genet papers.

each other's homes, inquiring about each other's families, and Blatchford was calling for the Chief Justice in a T-cart to drive him to the Country Club.²²

Lucius Q. C. Lamar of Mississippi, who as the junior member of the Court sat on the extreme left, was of French Huguenot ancestry. He had lived a more checkered life before coming to the Court than any of his colleagues. Before the war he had been a professor of mathematics at the University of Mississippi and a member of Congress from that state. He had drafted the Mississippi ordinance of secession and served in the Confederate Congress and as the Confederate envoy to Russia. He had surrendered at Appomattox as a colonel in the Confederate Army. Returning to Mississippi, he had practiced law and had been professor of ethics and metaphysics and later of law in the state university. He was elected to Congress in 1873 and won national renown when he seized the occasion of the memorial proceedings for Senator Sumner to deliver an address showing how completely the South accepted the war's verdict and suggesting the same humanity toward the prostrate South as Sumner had shown toward the slaves and later towards the vanquished. In the Senate, to which he was elected a few years later he had earned the respect of the Northern Senators as a dangerous adversary in debate. While he was Senator he became the intimate friend of Henry Adams. Lamar is spoken of with ecstatic praise in the *Education of Henry Adams*, the author of which was not prone to careless friendships, or to overgenerous judgments—even of his friends. Before Lamar was appointed to the Court he was Secretary of the Interior in President Cleveland's cabi-

net. He and Fuller were the only Justices appointed by Cleveland in his first term; Lamar had been on the Court only a few months when Fuller was appointed.

He was perhaps the Court's most thoughtful member,—almost dreamy in his preoccupation. But he had an extraordinary memory of a lifetime of diligent reading. Fuller said of him: "His was the most suggestive mind that I ever knew, and not one of us but has drawn from its inexhaustible store."²³ Like Fuller and Field, Lamar was a Democrat and was not inclined to yield principle to expediency.

He was anxious that Fuller's appointment as Chief Justice should command popular approval. A few days after Fuller's accession, Lamar wrote him suggesting that the Chief Justice himself should write the opinion in the *Bell Telephone* case. "It is a very important and notable case," he wrote, "to which public attention has been directed and the opinion delivered will certainly attract attention. . . . The case is one on which you will have a good opportunity to make your first exposition of national law in your character as Chief Justice. I do not think you should give it away." Fuller, however, assigned the case to Justice Miller.²⁴

Lamar was jubilant when Fuller's centennial speech on Washington was so well received. A week later, Grover Cleveland (now retired to private life) wrote Fuller that he had not read the address but everyone was praising it as a fresh approach in an overworked field. "Mr. Weston²⁵ was here today," Cleveland wrote, "and . . . I enjoyed his description of it all and especially the joy and triumph of that grand character, Lamar. . . . It was so like Lamar to

rush in to your house and tell you all the good things he had heard." A week later Cleveland wrote Fuller that he had read the address. "I cannot refrain from telling you," he said, "how well in my opinion it and its author deserve all the grand things said about them . . . Lamar wrote me on the 6th of December: 'The Chief Justice has read me his address on Washington. It is admirable even for a Chief Justice.'"²⁶

The Court, of which Fuller became the head, thus consisted of extremely forceful, able men. But they were highly diverse in their backgrounds and philosophies. They were not likely to be unanimous in any case where there was room for difference of opinion. They required a Chief Justice who would command their respect and keep their differences within the bounds of propriety.

Since Fuller was so small in stature it was thought necessary to elevate his chair on the bench and give him a hassock to keep his feet from swinging in the air. Most of the pictures of the Court taken during his regime show this arrangement. But a granddaughter of Justice Miller recently wrote: "You speak of Justice Fuller being a 'tiny man.' I never heard any reference whatever to his size. His position on the bench gave him the necessary stature and he was always invariably 'The Chief.'"²⁷

22. Many dinner acceptances from Blatchford are in the Genet papers. On Blatchford's superior dinners, see Williston, *Life and Law*, An Autobiography 97-98; Blatchford to Fuller, June 24, 1891, May 17, 1893, Genet papers.

23. Quoted in Mayes, *Lucius Q. C. Lamar* 546.

24. Lamar to Fuller, October 13, 1888, Genet papers. The case is *United States v. Bell Telephone Company*, 128 U. S. 315 (1888); and see Williston, *Life and Law*, An Autobiography 98.

25. Mr. Weston is probably Fuller's cousin, Melville Weston, Esq., of Boston.

26. Cleveland to Fuller, December 15, 22, 1889, Wallace papers.

27. Mrs. Lucy M. Clarkson, May 12, 1947, to the author.

Sources, except manuscripts, which are cited in notes:

On Justice Miller:

Interviews R. D. Weston, Roland Gray, Professor Samuel Williston
Correspondence with Mrs. Lucy M. Clarkson, granddaughter of Justice Miller
Gregory, "Samuel Freeman Miller"
Miller, Address before Iowa State Bar Association, reported in *Albany Law Journal*, July 12, 1879

Strong, "Justice Samuel Freeman Miller," *Annals of Iowa*, January, 1894

Fairman, *Mr. Justice Miller and the Supreme Court*

Williston, *Life and Law*, An Autobiography
Dictionary of American Biography
Warren, *The Supreme Court in United States History*

Cullom, *Fifty Years of Public Service*
Fuller, In Memoriam, Samuel F. Miller, 137 U. S. 701, 706

On Justice Field:

Swisher, *Stephen J. Field, Craftsman of the Law*
Terry, *Character and Career of Stephen J. Field as it is known in California*
Black, *S. J. Field's own Reminiscences; Some Account of the Work of Stephen J. Field*
Dictionary of American Biography

On Justice Harlan:

Dictionary of American Biography
Clark, *The Constitutional Doctrines of Justice Harlan*

Fairman, Mr. Justice Miller and the Supreme Court
Butler, A Century at the Bar of the Supreme
Court of the United States
Williston, Life and Law, An Autobiography
Howe, Holmes-Pollock Letters

On Justice Bradley:

Williston, Life and Law, An Autobiography
Bradley, Miscellaneous Writings of Joseph P.
Bradley

Fairman, Mr. Justice Miller and the Supreme
Court

"Mr. Justice Bradley's Appointment to the
Supreme Court and the Legal Tender Cases,"
54 Harv. L. Rev., 977, 1128

Swisher, Stephen J. Field

Warren, The Supreme Court in United States
History

On Justice Gray:

Hoar, Memorial in Proceedings Massachusetts
Historical Society 2d Series, Vol. XVIII, pages
155-187

Adams, Memorial in Proceedings Massachusetts
Historical Society 2d Series, Vol. XVI, pages
251-268

Williston, Life and Law, An Autobiography

Interviews: Professor Samuel Williston and
Roland Gray

Dictionary of American Biography
24 American Law Review 997

On Justice Blatchford:

Swaine, The Cravath Firm
Blatchford, Blatchford Memorial, II

Fairman, Mr. Justice Miller and the Supreme
Court

Dictionary of American Biography
In Memoriam, Samuel Blatchford, 150 U. S. 707

On Justice Lamar:

Moyes, Lucius Q. C. Lamar, His Life, Times and
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Cate, Lucius Q. C. Lamar

Adams, Education of Henry Adams

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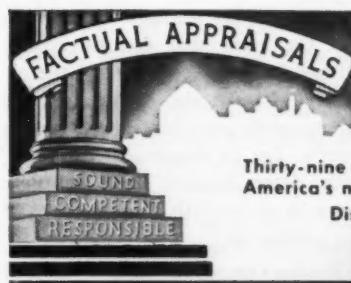
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Coordination of Effort Among Bar Associations

The work of organizing coordination committees in the several states as described in previous issues of the JOURNAL has been practically completed. Forty-three of the forty-eight states have already appointed committees to coordinate the activities in their respective states with the work of the American Bar Association. The appointment of coordinating committees in the remaining states is in the course of accomplishment. As quickly as practicable it is expected that committees will be appointed in each state bar association and in the larger local associations parallel with those sections and committees operating in the American Bar Association wherever local interest and necessities make it appropriate. It is hoped that particular emphasis will be centered by all these state and local associations on parallel committees on American Citizenship, Legal Aid, Lawyers' Reference Service, Continuing Legal Education, Judicial Selection and Tenure, Unauthorized Practice of the Law, Public Relations, and thereafter, as seems appropriate, any other committees in which particular interest is manifested in their own associations.

I wish to express my grateful appreciation for the cordial willingness which has been shown by all in this effort to cooperate unitedly in the advancement of the professional objectives. The results to date afford a striking illustration of the seriousness and the determination on the part of the profession generally to work together in a spirit of common understanding and common interest on matters in which lawyers have a deep concern.

I am satisfied that the Bar of the

country hardly realizes its strength and the good that can be accomplished by a united effort of the organized Bar of the nation. Future success seems assured. We are on the march. Let us continue with vigor, with determination and complete unity to accomplish the objectives of our profession.

Roscoe Pound, the former Dean of the Harvard Law School, has recently written me a letter stating that he thinks that the project for the integration of effort among bar associations is most timely and that what I am urging seems to be of the very first importance in the country.

Harold J. Gallagher, Esq.
15 Broad Street
New York, New York
Dear Mr. Gallagher:

I have read with a great deal of interest what you say about integration of effort among bar associations on page 44 of the AMERICAN BAR ASSOCIATION JOURNAL for January. What you are urging seems to me to be of the very first importance for the profession of law in this country. The high value of the professional ideal is still not as well understood by the lay public as it should be. Now that the professional ideal is menaced seriously by the rise of the service state, it becomes the more important that the lawyers be thoroughly organized and their activities integrated so as to bring all of the resources of the profession to bear to bring home to the public what impairment of the professional ideal and reducing of the members of a profession to a status of mere money-makers means, not merely to the administration of justice, but to our American institutions in which so many legal questions are political, and so many political questions legal.

There has never been complete recovery from the deprofessionalizing of the professions in our formative era. But as much has been gained in reprofessionalizing, new threats have developed which it will require the utmost wisely-directed activity on the part of organized bars and bar associations to meet adequately.

Enormous multiplication of detail in every branch of learning has made it beyond the power of the individual practitioner to master these details completely. In consequence, the law office in the large city constantly increases in size, and increasingly large staffs of assistants and associates are to be found everywhere. In such of-

fices the pressure of business methods, which easily become the methods of competitive, acquisitive activity, is difficult to resist. Moreover, the legal departments of great business utilities, the legal departments of great industrial enterprises, and the legal staffs of great administrative bureaus, national, state and municipal, are bringing into being something very like a class of employees of corporations, and seems likely to bring up a generation of young lawyers who do not distinguish themselves as members of a profession from employees engaged solely in earning a livelihood. This is especially worth thinking about in view of the movement on the part of the two major labor organizations in the country to organize what they call the "white collar employees" in industry, and indeed in government. For here in Los Angeles, the probation officers, whom we had supposed were members of a rising profession of social workers, are organized in a union affiliated with the American Federation of Labor.

In view of these circumstances, your project of integration of efforts on the part of every type of professional organization of lawyers is indeed timely.

Yours very truly,
SCHOOL OF LAW
LOS ANGELES, CALIFORNIA
ROScoe POUND

Work of Committees

This Committee actively engaged in its efforts to assemble from all available sources the material that is being published by different organizations throughout the country in advancing the cause of American citizenship. It is particularly interested in determining the extent of the citizenship work now being done by state and local bar associations. The chairman of the committee will welcome any information or suggestions by anyone who reads this page that will aid in the development of this nation-wide program. His address is John C. Cooper, No. 1 Armour Road, Princeton, New Jersey. It seems to me that no more important work lies before the lawyers of the United States than to acquaint themselves with the privileges and obligations that necessarily go with citizenship, and to educate and re-educate the public, including children and adults, as to the basic principles upon which our form of government rests; as to why the Bill of Rights was written into the Constitution protecting the

inalienable rights of man; and as to the importance of never taking our form of government for granted or forgetting that vigilance is necessary to retain the rights which our forefathers fought and died to obtain.

This Committee is actively engaged in seeking to promote a definite program for the improvement of public relations. The Board of Governors at the mid-year meeting authorized the appointment of conference groups to serve under the Public Relations Committee to deal with press, radio, motion pictures and comics, to endeavor to be sure that such media of communication will treat with greater accuracy the work of the lawyer and portray his activities in a truer light than all too frequently has been found to be the case.

The Legal Aid Committee is actively engaged in an effort to see that legal aid offices are opened as quickly as possible in the remaining cities of over 100,000 population having no legal aid and to endeavor to interest the state and local bar associations in following the example of the New Jersey State Bar Association in establishing legal aid societies in every county. Efforts are also being made by the Committee on Lawyers' Reference Service to promote in all cities of over 50,000 population the creation of legal referral offices with panels of volunteer lawyers to provide persons of moderate means with legal services at a moderate cost. The legal profession owes a duty to provide legal service to all the people regardless of their ability to pay. The profession enjoys a privilege to practice law. It is not a right. Lawyers must live up to their obligations to furnish the service which is required by the public if they are to retain the privilege that has been accorded to them. This may be done to the advantage of the profession and of the public by establishing legal aid societies and lawyer reference services in their communities.


Wherever I have spoken on this subject I have found the press treating this matter with respect. Editorial comment of the most gratifying nature has been printed extensively.

Nation-wide press coverage of the Lawyers' Reference Service plan has been given. I can think of no better way of promoting lasting public relations than through advancing the cause of legal aid and the lawyer reference service.

The Committee on Lawyers' Reference Service is about to complete a brochure which will outline in very simple form the procedure necessary to bring about the establishment of these legal referral offices. It can be obtained by writing to William M. Wherry, 30 Broad Street, New York 4, New York, Chairman of the Committee on Lawyer Reference Service.

This Committee has been devotedly engaged in the work of preventing unauthorized practice of the law. It should be understood that the work of this Committee is not for selfish purposes but primarily to protect the public from the practice of law by unqualified lay people who are not properly equipped to give legal service so that their clients run great risk of having their rights lost or inadequately presented. Through the activities of this Committee certain agreements have been concluded between this Association and representatives of the American Bankers' Association, Trust Division, and the National Association of Life Underwriters. This activity is referred to elsewhere in this issue.

This Committee, under the chairmanship of Harrison Tweed of New York, is actively engaged in promoting seminars and other study groups to advance the cause of continuing legal education, particularly in specialized fields. The competence of the lawyer is a foundation stone of



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good public relations. With the tremendous increase of specialization and the complications arising from the vast increase in statutory law, it is necessary for lawyers to equip themselves in these fields in order adequately to serve their clients and prevent the encroachment in the field of law by lay groups who purport to specialize in these fields. This Committee will be glad to cooperate in every way with the various state and local associations where practicable in furthering and aiding them in the promotion of this work.

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